TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 70.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; THE COUNTY OF WILKES, AND THE COUNTY OF TALIAFERRO, APPELLANTS,

vs.

GEORGIA RAILROAD AND BANKING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED FEBRUARY 6, 1908.

(21,006.)

(21,006.)

SUPREME COURT OF THE UNITED STATES

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No. 268.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; THE COUNTY OF WILKES, AND THE COUNTY OF TALIAFERRO, APPELLANTS,

vs.

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a No. —

WILLIAM A. WRIGHT, THE COUNTY OF WILKES, and THE COUNTY OF TALIAFERRO, Appellants,
versus
GEORGIA RAILROAD AND BANKING COMPANY, Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Transcript of the Record.

Solicitors for Appellants:

John C. Hart, (Atlanta, Georgia), Attorney General of the State of Georgia.
Samuel H. Sibley, (Union Point, Ga.)
Hooper Alexander, (Atlanta, Georgia).
Ligon Johnson, (Atlanta, Georgia).

Solicitors for Appellees:

Joseph B. Cumming, (Augusta, Georgia).
Alex C. King, (Atlanta, Georgia).

1 *Original Bill.*

UNITED STATES OF AMERICA, *Northern District of Georgia:*

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

The Georgia Railroad and Banking Company, which avers itself to be a corporation created and existing under the laws of the State of Georgia with its principal office in the City of Augusta in said State, hereinafter styled Orator, brings this its Bill of Complaint against William A. Wright, a citizen of the State of Georgia, resident in the Northern District thereof, in the City of Atlanta, and thereupon Your Orator complains and says—

(1) That the several parties, Plaintiff and Defendant, are citizens and residents as hereinbefore stated.

(2) That the matter in controversy exceeds, exclusive of interest and cost, the sum or amount of $2,000, and arises under the Constitution of the United States.

(3) Your Orator shows that on the 21st day of December, 1831, The Legislature of the State of Georgia passed an Act incorporating Your Orator under the name of "The Georgia Railroad Company." Thereafter, to-wit on the 18th day of December, 1835, said Legislature passed another Act, by the first section of which the name of Your Orator was changed to "The Georgia Railroad and Banking Company."

(4) By said first mentioned Act provision was made for the construction of a "Union Railroad" or "Middle Road" and three branch-railroads, from the terminus of the Union Road or Middle Road—one running to Athens, one to Eatonton and one to Madison—all of said named towns being in the State of Georgia.

(5) It was enacted in the 15th Section of the said first mentioned Act that "the stock of said Company and its Branches shall be exempt from taxation for and during the term of seven years
2 from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

(6) Your Orator shows that thereafter, to wit, December 25, 1837, said Legislature passed another Act by which your Orator should have the right to extend its Railroad from the town of Madison "to connect with and join the railroad (then) about to be constructed by the State from Tennessee line, near the Tennessee River to the Southern Bank of the Chattahoochee River." Said Act provided that for that purpose Your Orator should "have all the powers and privileges, rights and immunities in the construction of said Branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several Acts heretofore passed and of force, constituting the charter" of Your Orator.

(7) Your Orator shows that thereafter, to wit January 21, 1852, said Legislature passed an Act, authorizing and empowering your Orator and the Washington Rail or Plank Road Company to "consolidate their stock, and providing that the two Companies aforesaid, after the consolidation of their stock should be known as one corporate body, under the name and style of The Georgia Railroad and Banking Company and that said corporate body should be authorized to exercise all the powers and privileges conferred by existing laws upon The Georgia Railroad and Banking Company, and be under all the liabilities and restrictions, imposed on the same."

(8) Your Orator shows that all of the aforesaid Acts of the Legislature are public laws of the State of Georgia.

(9) Your Orator shows that under said Acts of the Legislature of Georgia, Your Orator constructed and equipped a main railroad from the City of Augusta to the City of Atlanta, a branch railroad from Union Point to the City of Athens and a branch railroad from a station on its main line, known as Barnett, to the town of Washington. All said localities are in the State of Georgia. The length of said Railroads is respectively: Main railroad 171 miles; Athens Branch 40 miles; Washington Branch 18 miles; Total 229 miles.

3 10. Your Orator shows that the stock of the said Company and its branches now consists of and is invested in said railroads set forth in paragraph (9) hereof, with their franchises, and their rolling stock, equipment, depots, freight-houses, section-houses, tools and other property connected with the said railroads of Orator, except to the amount of $44000, which is the proceeds of stock issued under an Act of the General Assembly of 1868; and that the same

and every part thereof are their investments, from which the net earnings are to be and are derived, one half of one per centum of which is to measure and fix the amount of taxes to be levied on and collected out of said railroads and other property, with their appurtenant and integral franchises.

Said railroads were constructed and equipped by the outlay of money, subscribed for said enterprises amounting to Four Million One hundred and fifty six thousand ($4,156,000). Said sum was subscribed and paid by the subscribers to Your Orator and invested by Your Orator under the terms hereinafter set forth of the 15th Section of Your Orator's original Charter in said railroads, their equipment and appurtenances.

11. Your Orator shows that by said Fifteenth Section of Orator's Charter and Orator's action thereunder, a contract was created between the State of Georgia and Your Orator, by which the State bound itself never to impose and levy a direct tax upon the property, in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property one half of one per cent. of the net earnings of said investments.

12. Your Orator shows that for Sixty three of the Seventy years of your Orator's life—Your Orator being absolutely exempt from every kind of tax during the first seven years—the State of Georgia has required of Your Orator, and Your Orator has paid, taxes, upon the theory and practice of such a contract; and said practice of the State as to Your Orator's taxes was never departed from until the passage of an Act by the Legislature, as hereinafter stated.

13. Your Orator shows that by the laws of the State of Georgia, Railroad Companies are required to make their annual re-
4 turns for the purpose of taxation to the Comptroller General of said State, not only for the purposes of State, but also for the purposes of county and municipal taxation. That in accordance with the laws of the State of Georgia requiring from Railroad Companies annual returns to the Comptroller General of the State of all their taxable property, as modified by Your Orator's charter, Your Orator has made returns for taxation annually, said returns have been accepted and these taxes assessed thereon paid by Your Orator and accepted by the State. These returns have shown (first) said Railroad as hereinbefore described and its equipment, valued at Four Million two hundred thousand ($4,200,000) and (second) other property of your Orator. Said returns have claimed—and said claim has been allowed—that the said railroad and its equipment with its integral franchises, were exempt from tax, except to the extent of one-half of one per cent. on the net proceeds derived therefrom, except so far as they were the product of Forty four thousand ($44,000) Dollars invested under an amendment to Your Orator's Charter passed October 5, 1868—which said amendment did not exempt the investment made thereunder.

14. Your Orator shows that such a return as is described in the next preceding paragraph of this Bill of Complaint was made to the Comptroller General for the year 1903 as for former years. A copy of said return is hereunto annexed marked Exhibit A. But

your Orator shows that Defendant William A. Wright, who is the Comptroller General of the State, refused to receive said return and demanded of Your Orator a different return, as hereinafter set forth.

15. Your Orator shows that on the 17th day of December, 1902, An Act was passed by the General Assembly of Georgia, and approved by the Governor of said State, entitled "An Act to provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes", in and by which it was provided that the term "special franchise" as therein used, should include every right and privilege exercised within said State, granted to any person, partnership or corporation by said State, or its authority, or by any county, or county officer or officers, or any municipal corporation, or any officer thereof, for exercising the power of eminent domain, or for the use of any public highway or street, and every special right granted for the exercise of any public service, such as the construction or operation of railroads, and likewise for the enjoyment of many other like privileges.

Every person, partnership or corporation, holding or owning and exercising any special franchise in the State of Georgia is required to make a special return to the said Comptroller General, stating the value of said franchises as are exercised within said State, and particularly describing the same.

That by said Act, said franchises are classed as and defined to be property and are required to be taxed at the same rate as other property.

16. Your orator shows that on said demand of the Comptroller General, Your Orator made a second return, a copy of which is hereunto annexed, marked exhibit B. But your Orator protested in making said second return, that no part of said railroad or its equipment—except as to $44,000 as aforesaid was subject to property taxation.

17. Your orator shows that Your Orator has offered, and continues to offer, to pay the amount of taxes assessable against it under its Charter, to-wit one half of one per cent. of the net earnings of its investments. But the Comptroller General refuses to accept said payment as a compliance by Your Orator with its legal obligation to pay taxes; but, on the contrary claims: First that Your Orator should pay a direct tax on the value of its aforesaid railroad and equipment in excess of Four Million One hundred and fifty six thousand dollars; and *Second* that your Orator should pay a tax on Your Orotor's franchises. Said second claim is made under said Act of the Legislature of Georgia approved December 17, 1902, entitled "An Act To Provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes."

(18) But Your Orator avers that it is not liable to said franchise tax or to any tax as to its said railroad and equipment, except a property tax on $44,000 and an income tax of one half of one per cent. on its net earnings.

(19) Your Orator shows that its railroad property, the representative of the investment of its stock, has, as an inseparable and

essential element constituting its chief value as the invest-
6 ment of its stock, the very franchise attempted to be thus
separately taxed. That but for such franchises said property would be of little if any value, and of no value whatever as a railroad. That but for the element of value derived from the franchise, the capital stock could not have been raised, it would not have been invested in the railroad property above mentioned, and no income nor proceeds, net or gross, of any kind could be derived therefrom.

Your Orator shows that an amount equal to one-half of one per centum upon the net proceeds of the said railroads and their franchises, is, by its contract with the states under which said railroads and franchises, with their equipments were invested in by the said Company, fixed as the property tax to be levied on said railroads, franchises and equipments, and that any pretended act of the legislature of Georgia assuming to levy any other sum upon any part or against any part of said property, including said franchises, impairs the obligation of the contract made by the State of Georgia with Your Orator by said Section 15 of said Act of 1833, and is contrary to the Constitution of the United States.

(20) But Your Orator shows that nevertheless the said William A. Wright, who is Comptroller General of the State of Georgia, acting as such Comptroller General, insists that Your Orator shall pay to the State of Georgia, to fifteen counties of said State and numerous municipalities through which Your Orator's said Railroad passes, a property tax on —— ($1,990,756) Dollars, said sum representing the alleged excess in value of Your Orator's investments in its said railroad over and above the par of Your Orator's capital stock—the tax thus demanded being for the year 1903 $20000 or other large sum.

(21) Your orator shows that said William A. Wright acting as Comptroller General as aforesaid, claims that the franchises of Your Orator should be valued outside of, and in addition to, its property at a large but as yet indefinite sum, and that Your Orator shall pay taxes on said sum, when determined, to the State of Georgia, to fifteen counties of said State and to numerous municipalities through which Your Orator's said Railroad passes.

(22) Your Orator shows that said Comptroller General is threatening and is about to proceed, to collect said illegal taxes by levy and sale of Your Orator's property.

7 (23) Your Orator shows that said purpose and attempt to collect said taxes are illegal and void: Because the Charter of Your Orator is a contract between Your Orator and the State of Georgia, and by said contract said State bound itself to exact no taxes from Your Orator on account of its investments in the railroad aforesaid, exceeding one half of one per cent. of the net earnings of said investments, and said taxes would be greatly in excess of one half of one per cent. of said earnings; and said threatened action of said Comptroller General and said Act of the Legislature of Georgia of December 17, 1902 would impair the obligation of said contract, and are unconstitutional, null and void under Paragraph 1 of Article 10 of the Amendments to the Constitution of the United States.

(24) That the railroads of the state so valued are returned and their valuations are demanded by the Comptroller General at a higher value, proportioned to their market value, than is any other species of property in the State; that the taxing officers of said state require returns of all other property to be made, and accept same at a percentage of real value far below the percentages required of Your Orator and other owners of railroads in said state of Georgia, and deny to Your Orator and other owners of railroads in this State, the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

25. Your Orator shows that the laws of the State of Georgia, governing the returns of property for taxation, require such returns to be made at the fair market value of said property. That such valuation of railroads in their return is required of railroad companies in making such returns, and such returns thus made do, and of necessity must, include as one element of value, the value as property and as a part of the railroad as a property, the "special franchises" as defined in said Act of 1902 above named, possessed, used or exercised in building owning or operating a railroad

26. That the demand of said Comptroller General that Your Orator should pay taxes upon its railroad and property, to wit on the amount of four million, one hundred fifty six thousand dollars thereof, as equal to one half of one per cent. of the net proceeds of the
8 earnings of said railroad and properties and upon the surplus of valuation of said railroad and other properties at the rate of tax levied by the state, and also should pay a tax upon the alleged valuation fixed upon its alleged franchises as a part of its property, is, if enforced the taxation by the said state of the property of your Orator and of the same property twice, in this that the value of said railroads and other property upon which said taxes first herein mentioned are levied includes as a part and integral element of said railroads and other property the franchises to own, operate, use and construct the same, including the franchise of eminent domain; that without the same, the said property would be of value only as so much material, and would not be of the value mentioned in said return Exhibit B and that said valuation is not fixed upon the basis of said railroad as so much material, but is fixed upon the same as an operating, going railroad, and includes therein, as an element and part of said property, the said franchises so attempted to be separately taxed; that the laws of said state require the return of railroads for taxation, not as so much material, but as going concerns, and includes in such valuations each and every one of the franchises so required to be specially returned by the aforesaid Act, approved December 17, 1902; that if the said Comptroller General is allowed to collect taxes on the said railroads and other property of Your Orator as specified in said return Exhibit B in accordance with the valuation therein fixed, and also to collect additional taxes upon the so-called special franchise of Your Orator, as described in said Act of the General Assembly approved December 17, 1902, Your Orator will be paying taxes twice upon the same property, to wit upon said franchises and their value; that such payment and demand will not

only be contrary to the Constitution of the State of Georgia, which provides that all taxation of property shall be *ad valorem* and uniform, but will also be in violation of the Fourteenth Amendment to the Constitution of the United States, in that it will deny Your Orator the equal protection of the laws and compel it to pay taxes twice upon the same property, whereas the other tax payers of said State are only required to pay taxes upon the same property once;

9 that under the Constitution of the State of Georgia, no classification of property for the purpose of taxation is permitted, but all property is divided into two classes—that which is exempt from taxation, said exempted property being specified in the Constitution of said State, and property which is not exempt; and that the property of railroads, including their franchises, together with all other property not exempt, stands in one class, and unless taxed in the same manner and to the same extent only, the owners of said railroad property and franchises are denied the equal protection of the laws.

(27) Your Orator being remediless under the rules of the Common Law and unable to obtain any relief except in a Court of Equity, to the end that the Defendant William A. Wright may, if he can, answer the several charges hereinbefore made against him, but not under oath, waives discovery from said Defendant and prays:

First. That it be adjudged that Your Orator is not liable for a property tax on its Railroad aforesaid, or any tax on its franchises; and that the only tax for which Your Orator is liable is a tax to the State only, not to exceed one half of one per cent. of the net earnings of Your Orator's investments in its railroad.

Second. That the said William A. Wright, Comptroller General, be enjoined from issuing any execution or taking any step to collect any tax from Your Orator, other than one half of one per cent. of the net earnings of its investments, or any tax on Your Orator's franchises.

Third. That Your Orator may have all other and further relief that its case may require and equity can afford.

And your orator will ever pray, etc.

JOS. B. & BRYAN CUMMING,
Complainant's Solicitors.

KING, SPALDING & LITTLE,
Of Counsel.

(Here follow Exhibit A and Exhibit B, tax returns, marked pp. 10 and 11.)

12 STATE OF GEORGIA, *Richmond County:*

You Jacob Phinizy do swear that you are the President of The Georgia Railroad and Banking Company; and that the matters and things in the foregoing Bill stated are true of your own knowledge, except where stated upon information and belief, and that these you verily believe to be true.

JACOB PHINIZY.

Sworn to and subscribed before me this 6th day of January 1904.

GEO. K. CALVIN,
U. S. Commissioner for Southern District of Georgia.

Filing.

Original Bill Filed in Clerk's Office January 7th, 1904.

O. C. FULLER, *Clerk.*

13 *Order to Show Cause and Temporary Restraining Order.*

In the Circuit Court of the United States for the Northern District of Georgia.

In Equity. # 1192.

THE GEORGIA RAILROAD AND BANKING COMPANY
v.
WM. A. WRIGHT.

Upon considering the bill of complaint in the above stated case, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a. m. or so soon thereafter as counsel can be heard, at the United States Court House in the City of Atlanta, Georgia, why the injunction prayed for therein should not be granted; and in the meantime, until the further order of the Court, the said defendant, Wm. A. Wright, is restrained as prayed for in said bill.

Let the said defendant be served with subpœna and a copy of this order at least 15 days before the hearing.

This 7th day of January, 1904.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office 7 day of Jan'y 1904.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

14 UNITED STATES OF AMERICA,
Northern District of Georgia:

In Equity.

THE GEORGIA RAILWAY & BANKING COMPANY, Complainant,
and
WILLIAM A. WRIGHT, Defendant.

The President of the United States to William A. Wright:

For certain causes offered before the Judges of the Circuit Court of the United States for the Northern District of Georgia, in Equity, you are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the Clerk's office of the said Court, in the City of Atlanta, at Rules to be had on the first Monday in February 1904 next, to answer to those things which shall then and there be objected to you by the Bill of Complaint of the Georgia Railway and Banking Company and to do further, and receive what the said Court shall have considered in this behalf, and this you may in no wise omit, under penalty of Five Hundred Dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January in the year of our Lord, One Thousand Nine Hundred and four.

[Seal U. S. Circuit Court, Northern District of Georgia.]

O. C. FULLER, *Clerk.*

MEMORANDUM.—The Defendant is required to enter his appearance in the suit above stated, in the Clerk's Office, on or before the day at which this Writ of Subpœna is returnable, otherwise the Bill may be taken *pro confesso.* O. C. FULLER, *Clerk.*

14½ [Endorsed:] No. 1192. In Equity. In the Circuit Court of the United States for the Northern District of Georgia. February Rules, 1904. In Equity. The Georgia Railroad and Banking Co., Complainant, and William A. Wright, Defendant. Subpœna. Returned into Clerk's Office, and filed January 9th, 1904. O. C. Fuller, Clerk. Jos. B. & Bryan Cumming, King, Spalding & Little, Complainant's Solicitors.

I Certify that I served the within Writ of Subpœna on the parties at the places, time, and in manner stated.

Name of person served. How served. When served. Where served.

Service of Subpœna and all further service waived, copy subpœna and order received.

This January 9th, 1904.

WILLIAM A. WRIGHT,
By JNO. C. HART,
Att'y at Law & Attorney General for Georgia.

The return of —— —— Marshal, this —— day of —— 190 .
By —— —— *Deputy.*

Marshal's Costs, $—.

15 *Exceptions of Wm. A. Wright.*

In the Circuit Court of the United States for the Northern District of Georgia

No. —. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT.

Exceptions Filed by the Defendant to the Original Bill Filed in this Cause by Plaintiff for Irrelevancy.

Now comes Wm. A. Wright, the defendant in the above stated cause and excepts to all of paragraph 24 of complainant's bill and for cause of exception says,

1. The Constitution and laws of the State require that all property shall be taxed ad valorem and uniform. The laws of the State treat alike, for the purpose of taxation, railroad property and all other species of property. The mal-administration of a valid State law makes no Federal question. No law can be held un-constitutional unless it conflicts with the constitution.

2. In this case the taxes sought to be collected are upon the return made by the complainant itself, and while it protests against its liability to taxation, by reason of the provision in its charter, no question is raised that the values placed upon the property sought to be taxed are beyond their true market value.

3. Complainant will not be heard to set up in a court of equity that other species of property has been returned, or accepted, for taxation, at a percentage of value lower than it offers to return its property for taxation, without first having tendered at least the taxes due by it at the valuation fixed upon other species of property.

4. Return of property in this State is made primarily by the property owner, or in case of corporations, by the representative of such corporation. In case of railroads the property is returned to the Comptroller General. In case of other species of property,

16 to the tax receivers of the State. In case of disagreement between the owners or representative of the property to be taxed and the taxing officer, it is provided that the ultimate fixing of value is by arbitration and by arbitrators selected by the parties at interest. It will be noted therefore that the allegations in paragraph 24 are misleading and are not founded upon either law or fact, and are not pertinent or relevant to the issue, and present no Federal question.

Therefore this exceptant excepts to that portion of the bill as impertinent and humbly insists that that portion ought to be expunged therefrom.

JNO. C. HART.
Counsel for Defendant.

UNITED STATES OF AMERICA,
Northern District of Georgia, County of Fulton:

Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing exception is not interposed for delay and that the same is true in point of fact.

WM. A. WRIGHT, *Defendant.*

Subscribed and sworn to before me this 3 day of March, 1904.

W. H. HARRISON,
N. P., Fulton Co., Ga.

I hereby certify that in my opinion the foregoing exception is well founded in point of law.

JNO. C. HART,
Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

17 *Plea of Wm. A. Wright.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. —. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT.

Plea of Wm. A. Wright, the Above Named Defendant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill to be true in such manner and form as same are therein set forth and alleged, pleads to said bill as follows; to wit.

1. That the charter by said bill specified and as in said bill shown, is a charter granted by the Legislature of the St[illegible] of Georgia by an Act of December 31st, 1833, and is a statute as a part of the general law of the State of Georgia.

2. At the February Term, 1879, of the Supreme Court of Georgia in the case of Goldsmith, Comptroller viceneral *vs.* Georgia Railroad Company, and the Georgia Railroad Company *vs.* Goldsmith, Comptroller General, reported in the 62 Ga. p. 185 *et seq.* the Supreme Court construed said charter and statute of the State of Georgia, particularly the section by complainant in this bill sought to be plead as an exemption to the tax levy complained of.

3. That by said decision the Court declared the true construction of said charter and statute, and the proper mode of taxation thereunder, to be as follows;

"2. The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch. 54 Ga., 423. The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate, (that is at such per centage as will yield a revenue to the State equal to one-half of one per cent. on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, as-
18 sess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter upon the whole value, as in no case is the general rate, this is, the rate *ad valorem* imposed upon property generally, to be exceeded."

4. That said decision is the true, proper, legal construction of the said charter, is between the same parties and involves the question now raised by complainant, and said judgment will be observed by, and is binding upon, this Honorable Court.

5. That said levy sought to be enjoined is in strict accord with the construction of said charter, the tax exemptions thereunder and the findings, terms and conditions of said decision and the laws of the State of Georgia, and in therefore a legal and proper levy.

All of which matters and things this defendant avers to be true and pleads *res judicata* to said bill and prays judgment of this Honorable Court whether he should be compelled to make any other or further answer to said bill, and prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

JNO. C. HART,
Counsel for Defendant.

UNITED STATES OF AMERICA,
Northern District of Georgia, County of Fulton:

And Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing plea is not interposed for delay and that the same is true in point of fact.

WM. A. WRIGHT, *Defendant.*

Subscribed and sworn to before me this 3 day of February, 1904.

W. H. HARRISON,
N. P., Fulton Co., Ga.

I certify that in my opinion the foregoing plea is well founded in point of law.

JNO. C. HART,
Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

19 *Demurrer of Wm. A. Wright.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. —. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT.

Demurrer of Wm. A. Wright, Defendant Above Named.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said bill to be true in such manner and form as same are therein set forth and alleged, demurs to said bill as follows; to-wit:—

1. Said bill upon its face shows the same to be a suit between a citizen of the State of Georgia and said State or a citizen thereof and no federal question is presented by said bill.

2. It appears from plaintiff's own showing by said bill that it is not entitled to the relief prayed against defendant.

3. Defendant specially demurs to paragraph 23 in the original bill of complaint in which paragraph it is alleged the charter of complainant is a contract between it and the State in which the State bound itself to exact no taxes from complainant in excess of one-half of one per cent. of the net earnings of complainant, and for cause of demurrer says,

The Act of December 17th, 1902, passed by the General Assembly of the State of Georgia and entitled "An Act to provide for and require the payment of taxes on franchises and *the* prescribe the method for the return and payment of said taxes" does not, as claimed by complainant impair the obligation of the contract set forth in complainant's charter in violation of Article 1, Section 10, paragraph 1 of the Constitution of the United States, for by the charter of complainant the limitation of the tax rate applied to the original investment represented by stock in said company and that the franchise of said company is not within the property protected.

4. Defendant demurs to paragraph 11 of complainant's
20 bill in which paragraph complainant avers that a contract was created between the State of Georgia and complainant by the 15th Section of complainant's charter by which contract the State bound itself never to impose and levy a direct tax upon the property in which said subscriptions were invested but to receive in lieu of all taxes and burdens on said property one-half of one per cent. of the net earnings of said investment and for cause of demurrer says,

That the provision aforesaid is a covenant between the State and the stockholder that it would never levy a tax on the original investment in said railroad company in excess of one-half of one per

cent. of the net investments thereof, but that the State did not contract to commute the tax rate upon the property of complainant in excess of the original investment and that the surplus which it was seeking to tax at the general rate is not protected under the contract as claimed by complainant and that said excess of property which represents accumulated profits, surplus and subsequent investments is not protected by said contract.

Wherefore and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto and humbly demands judgment of this Court whether he should be compelled to make further answer to said bill or to the parts of said bill demurred to as aforesaid, and prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

JNO. C. HART,
Counsel for Defendant.

UNITED STATES OF AMERICA,
Northern District of Georgia, County of Fulton:

Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

WM. A. WRIGHT, *Defendant.*

Subscribed and sworn to before me this 3 day of February, 1904.

W. H. HARRISON,
N. P., Fulton Co., Ga.

21 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. C. HART,
Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

22 *Amendment to Bill.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

THE GEORGIA RAILROAD AND BANKING COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General.

Complainant by leave of the Court amends its bill of complaint in this case, by adding thereto a new paragraph to be known as Paragraph 12½ and to come just after paragraph 12, and before paragraph 13 thereof.

This complainant avers that it is *res judicata* between your Orator and said State of Georgia, that said Section 15 of the charter

aforesaid constituted a contract exempting from taxation its railroad, equipment, franchises and appurtenances as the investment of its stock, except to the extent of said one-half of one per centum per annum on said net income.

Said State of Georgia in the year 1875 undertook to collect taxes upon the said railroad equipment, franchises and appurtenances, by levying thereon and collecting therefrom taxes as against other railroad companies having no charter provisions, governing taxation, under the Act of 1874 for the taxation of Railroads. Said State through its Comptroller General issued an execution for the collection of such taxes so claimed. Said execution was arrested by the making of an affidavit of illegality as prescribed by law for trying the issue of said legality of said tax, the same being brought to, and returnable to the Superior Court of Fulton County, Georgia. Said case was duly tried in said Court, the issue being that by reason of said Section 15 of Orator's charter this complainant was not subject to be so taxed. Said Court adjudged that said Section of said charter relieved said complainant from liability to said tax, and that under said section it could not be taxed except as to the investment of its stock subscribed under an amendment to its charter passed by the General Assembly of Georgia in the year 1868 for building what was called the Clayton Branch, and final judgment was entered accordingly. Said case was appealed by said State to the Supreme Court of Georgia, where said judgment was in all things
23 affirmed.

No other final judgment has ever been had construing your Orator's exemption from, or contract governing, taxation. Said judgment adjudges that said contract is one regulating the liability of the corporation, your Orator, to taxation upon its property, and not the liability to taxation of its shareholders, and also that the same exempts its railroads, franchises, equipment and appurtenances, except the investment made under said Act of 1868.

Complainant offers to produce the record of said cause and judgment, and says that the same is *res judicata* as aforesaid.

JOS. B. CUMMING,
BRYAN CUMMING,
Complainant's Solicitors.

KING, SPALDING & LITTLE,
Of Counsel.

Order Allowing Amendment.

This amendment is allowed and ordered filed.
This May 13th, 1904.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office May 13th, 1904.

O. C. FULLER, *Clerk.*
By J. C. MOORE, *Deputy.*

In the Circuit Court of the United States for the Northern District of Georgia.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT, Comptroller General.

Opinion.

This is a bill brought by the complainant corporation against the defendant Wm. A. Wright, Comptroller General of the State of Georgia, seeking an injunction against what the company claims is an illegal effort to tax it, and to have a decree adjudging that it is not liable for a property tax on its railroad, or any tax on its franchise, and that the only tax for which it is liable is a tax to the State of one-half of one per cent. on the net earnings of its investments.

The defendant has interposed demurrers and pleas, and the complainant, by an amendment, the plea of *res judicata*, all of which, however, put in issue and bring before the court clearly, certain specific questions as to the liability of the complainant company for taxation by the state of Georgia, which will be hereafter referred to.

The Georgia Railroad & Banking Company was incorporated originally under the name of the Georgia Railroad Company, by an act passed by the legislature of Georgia, approved December 21st, 1833. The provision of the act material here, and which is for construction, is a part of the fifteenth section, as follows: "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

The State has for sixty years or more allowed the company to return its net earnings and pay a tax thereon of one-half of one per cent. without objection, so far as shown here, except (as will be hereafter referred to) the effort to impose a property tax under the act of 1874.

The issues presented are: (1) Does the word "stock" as used in this taxing clause in the company's charter refer to stock in the aggregate in the hands of the company, (its capital stock) or

25 does it refer to stock in the hands of the shareholders? (2) Is the decision of the supreme court of Georgia rendered in 1874 on the right to tax this corporation, *res judicata* in this case? and (3) Is this company subject to a tax on its franchise under the Franchise Tax Act of the legislature of Georgia of 1902 in view of the taxing clause in its charter? Other minor questions are raised, but the foregoing are the main and important ones.

The distinguished Attorney General, representing the Comptroller General, contends that the word "stock" in the clause under consideration refers to stock in the hands of the shareholders, as distinguished from the entire capital stock of the company; and he concedes that the case very largely depends upon the soundness of his contention in this respect. He has urged with much force both in the oral argument and in the brief he has handed in, this view of the proper meaning of the taxing clause of the charter of the complainant company, which has been quoted above.

It may be remarked in the first place, that so far as this record shows, or so far as the reported cases show, no effort has ever been made on the part of the State or its officers to treat the scheme of taxation provided for in this clause of the Georgia Railroad Company's charter, as referring to shareholders. The tax has always been imposed upon the net earnings of the company, the State treating the word "stock" therefore, necessarily as meaning the capital stock in the hands of the company, and not the separate shares of stock in the hands of the shareholders. This course of procedure by the officials of the State has been justified by the decisions of the supreme court of the State.

In the case of *City Council of Augusta v. Georgia Railroad & Banking Company*, 26 Ga., 651, the language used by the court in the opinion, clearly indicates that such is its view of the meaning of the word "stock." This is from the opinion:

"We think, that this part of the charter means, secondly, that the stock of the company, as stock: as a unit; is alone what is to be subject to the tax;" etc. And this further expression: "We think, then, that the stock employed in banking, is to be considered as included in the expression, 'the stock of the company' and therefore, that it, also, is entitled to the exemption."

26 In the opinion of the court in *State of Georgia v. Georgia Railroad & Banking Company*, 51 Ga., 123, the language "that *its* tax shall not exceed one-half per cent, on *its* earnings" is manifestly to the same effect.

These expressions used by the Supreme Court in the decisions named, show beyond question that the court considered the term 'stock" as referring to stock in the aggregate in the hands of the company.

In *Ordinary of Bibb County v. Central Railroad & Banking Co.* 40 Ga., 646, 650, Judge Warner speaks of stock of a corporation in this way. "What is the 'stock' of said railroad companies? Bouvier defines stock to be, 'the capital of corporations: this is usually divided into shares of a definite value, as one hundred dollars, fifty dollars per share.' 2d Bouvier's Law Dictionary, 531. The stock of these companies then consists of their capital invested in such property as may be necessary and proper for conducting the business for which they were chartered. All the property of these companies that is *necessary* and *proper*, for the purpose of laying, building and *sustaining* their respective railroads, constitutes a *part* of the *capital stock* of said companies, and is not liable to be taxed in any other manner than is specified in their respective charters."

It is further urged that the use of the pronoun "their" preceding the word "investments" indicates that the reference in the clause is to shareholders who should become interested in this enterprise, and not to the corporation. The opposing contention is that it is used in the same sense as if the pronoun "its" had been used instead of "their".

An examination of this act shows the latter contention to be true, beyond question. The first section of the act has this language: "The company provided for in this Act and herein more especially incorporated and authorized shall and may direct and continue *their* first efforts" etc. In the third section, these two expressions are used: "The said company shall be at liberty to enlarge *their* capital", and "books for enlarging *their* capital" etc. And also in the same section: "so as to make *their* capital adequate" etc. And also this: "It shall be lawful for the company from time to time to invest so much of said parts of *their* capital or of *their* profits" etc. In section 9 this occurs: "The aforesaid company * * * by *their* corporate name aforesaid may sue" etc.

27 And in section 10: "The said Georgia Railroad Company shall have power and capacity to purchase and have and hold in fee simple or for years to *them* and *their* successors" etc.

In other instances the pronouns "their," "they" and "them" are used in referring to the company.

The language of the clause itself indicates that the word "their" relates to the company, and not to the stockholders separately. Reference would hardly be made to what the stockholder gets by way of a dividend, as the "net" proceeds of his investment. The use of the word "net" indicates that something is being deducted. It could only refer to the company, which deducts its expenses, and has clear, over and above all outlay, a certain amount, which is the net proceeds in its hands on the investment.

In addition to this, the supreme court of the State in *State of Georgia v. Georgia Railroad & Banking Company*, *supra*, clearly treats the word "their" as having this meaning, when the tax provided for in this clause is spoken of as a tax "on *its* earnings," etc.

There can be no reasonable doubt, therefore, considering this entire clause, that it refers to the capital stock of the company, and that it was the intention of these early lawmakers that the company should pay the State, after seven years from the completion of the road, one-half of one per cent. on its net earnings. There was nothing remarkable about this provision, when we consider the time and conditions. In 1833 railroad building was in its infancy. No one could tell whether this project would be successful, or not. It was experimental. Those who put in their capital might, (so far as could then be seen) suffer complete loss. What was more natural than that the legislature should allow a very moderate scheme of taxation for such an enterprise?

In 1874 an act was passed by the legislature of Georgia, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies and to define the liability of such companies to taxation, and to repeal so much of the charters of such

companies, respectively, as may conflict with the provisions of this Act." In the body of the act was provided that "the presidents of all the railroad companies in this State shall be required to return, on oath, annually to the Comptroller General, the value of
28 the property of their respective companies without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State."

Under this act an effort was made to tax the Georgia Railroad & Banking Company; the matter was carried into the courts, and determined in favor of the railroad company by the Superior Court of Fulton County. The case was taken by the State to the Supreme Court and by that court the judgment of the court below was affirmed. *State of Georgia v. Georgia Railroad & Banking Co., supra.*

The decision in that case is a comprehensive one. So much of the opinion by Judge McCay as is material here is as follows:

"As the Supreme Court of the United States is a court of appeals from this court, on a question of this character, I feel bound to conform myself to its decision, although, I feel it to be my duty to what I deem the truth, to express my dissent from the conclusions at which it has arrived. On the authority of these decisions, we therefore decide that it is competent for the general assembly to contract in the charter of a corporation, that it shall be exempt from taxation, or, as in the charter of the Georgia Railroad Company, that its tax shall not exceed one-half of one per cent. on its earnings, and that having so contracted, without reservation, it is not competent for a subsequent legislature to violate the obligation of that contract by assessing a higher tax. Nor has there been any legislation accepted by the company since the adoption of the Code which puts this corporation on a footing with the Central and Southwestern Roads, so as that the terms by which it holds its franchises and exemption is a charter granted since the Code and therefore capable of being withdrawn."

This decision is pleaded by the complainant here by an amendment to the bill as *res judicata*, and I think it must be so regarded. It is distinctly held that the tax of the Georgia Railroad & Banking Company shall not exceed "one-half of one per cent. on its earnings;" that this is a contract with the state, and that it is not competent for any subsequent legislature to violate the obligation of this contract by assessing a higher tax. That is what is attempted here, and the decision named clearly holds that this cannot be done. It is a decision, in my judgment, of the same question now before the court, and between the same parties.

In Southern Pacific Railroad v. United States, 168 U. S. 1-48, the rule in reference to *res judicata* is stated as follows:

"The general principle announced in numerous cases is that the right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same par-
29 ties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so

determined, must, as between the same parties or their privies be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Whatever doubts may have existed as to the question of *res judicata* applying in a case where liability for taxation has been determined for one year, and there was a proceeding for a succeeding year is now set at rest.

In *New Orleans v. Citizens Bank*, 167 U. S. 396, this question is discussed at some length by Mr. Justice White, delivering the opinion of a majority of the court. The following extract will show what was there determined:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppal resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

After quoting and discussing some of the authorities, the opinion proceeds:

"It follows then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the lawmaking and not to the judicial department. But if the judicial mind could entertain the suggestion, it seems clear that it is without real merit. In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of

the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between the parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Upon this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

After still further citation and discussion of authorities, the opinion continues:

"It follows, then, that the theory by which it is sought to take questions of taxation entirely out of the reach of the rule of the thing adjudged is not only without foundation in reason, but is also without support of authority, since the case from this court, which is cited to sustain it, cannot properly be said to maintain the contention, and the other from the Supreme Court of Iowa has been either overruled or qualified."

The foregoing extracts render any further citation of authority unnecessary, and the decision in the 54 Ga., involving, as I have stated, the same question, and being between the same parties as the present case, the judgment there is conclusive here.

But it is said that a decision of the Supreme Court of the State made subsequently to that which has just been discussed, (Goldsmith, Comptroller General *v.* Georgia Railroad Company, 32 Ga., 485) modifies the ruling made in the 54 Ga., and lays down a rule for taxing the Georgia Railroad & Banking Company, which should be followed here. In this last case the issue was made by an affidavit of illegality to an execution issued by the Comptroller General. The decision of the Supreme Court was that the judgment of the court below should be reversed, and that the affidavit of illegality which had been sustained in the superior court, dismissed, because, as was held, an affidavit of illegality would not be entertained as a mode of defense to a tax execution issued by the Comptroller General in any case in which the return had not been made by the railroad company as provided by the tax act of 1874. Notwithstanding the direction given the case, the supreme court laid down a rule for taxing the Georgia Railroad & Banking Company, which was in effect, that this property, so far as it had a value over and above the amount of the capital stock authorized and subscribed prior to January 1st, 1863, was subject to tax. The only thing decided in the case was that it was improperly brought and should be dismissed, conse-

quently the expressions of the court as to the proper method of taxing this corporation, could not affect the *res judicata* arising out of the case in the 54 Ga.

31 The decision in the 62 Ga., was made in 1879, and yet, for twenty-four years, or until 1903, no effort whatever was made to tax the Georgia Railroad & Banking Company in the method therein stated. The tax returns of the company have been made and the tax collected in the manner provided in the charter, on net earnings, and in the same manner as has been done since the railroad company commenced to pay taxes.

If what is stated in the 62 Ga., opinion had been in a case where the issue was made and determined, an entirely different question would be presented here. But where a case is dismissed out of court, any expressions therein cannot be regarded as controlling for the purpose of affecting a former binding adjudication.

It may be that the decision in the 54 Ga., should not be regarded as *res judicata* as to the effort to tax the franchise of this company under the tax act of 1902, and it may be proper that this should be considered as an original question here. But even as to the right to tax the franchise, it is a useful and important authority.

Having thus disposed of these two questions, the remaining one of the three more important questions raised in the case is that of the right of the State under the Franchise Tax Act, approved December 17th, 1902 to impose a tax on the franchise of the Georgia Railroad & Banking Company. The scheme of taxation as provided for this company in its charter is a broad one, and in my judgment, the tax of one-half of one per cent. on its net earnings embraces all the taxation it was intended should be exacted of this company. I think it was so ruled in the 54 Ga., case, which, as I have stated, is believed to be *res judicata* as to this case.

The term "stock" as used in the fifteenth section of the charter has been held to mean capital stock, and that the term "capital stock" embraces the franchise of the company as well as its physical property, can hardly admit of question. Without the franchise there would be no capital stock, properly speaking. The mere inertness of physical property would be valueless without the life imparted to it by the franchise; that is, the right to maintain and operate a railroad, and to take tolls. The tax provided by the charter is upon net earnings. Earnings are only obtained by the operation of the property, and this operation is by virtue of the powers and privileges granted in the charter, and these powers and privileges so granted, constitute the franchise.

32 Judge Bleckley, with his usual aptness, expresses this idea in his opinion in the case of *City of Atlanta v. Grant, Alexander & Co.*, 57 Ga., 340, 346, as follows:

"The franchise to be a corporation is what constitutes an artificial person. That is breath or being, and not property. You cannot sell it, any more than you can sell the life of a man. But things, and the right to use things for profit, are property, whether in the hands of a corporation or of a natural person. A chartered railroad is property. The rights and privileges conferred by charter to use it as an instrument of transportation, are also property; but they ad-

here to it as accessories or incidents, and adds to its value. Indeed, they give it its chief value. Without them, the railroad, as such, would be almost, or quite useless. To own it, would be like owning a horse, with no right to ride him, or drive him—no right to put him to labor. This would be owning materials, merely; the iron and timbers, the earth and masonry, of the railroad; or the hide and flesh and bones of the horse."

No opinion whatever is expressed as to the effect otherwise of the Franchise Tax Act of the Georgia legislature of 1902. It is only held here that as the scheme of taxation provided in the charter is to tax "stock" (meaning capital stock) by taxing the net earnings, that it necessarily covers and embraces the franchise. The decision does not go beyond this particular case, and the charter of this company. It is always a delicate matter for courts to interfere with the tax acts of the State, and this interference should not be extended beyond what is required by the case made.

Considering the tax clause of the charter under consideration in the several aspects argued by counsel and discussed by the court as above, or considering it more generally and as an entirety, it is clear that it was the intention of the lawmakers to provide a full and complete system of taxation for this corporation, and that it embraces its whole liability for taxation.

Whether the taxing clause in the charter of the Georgia Railroad & Banking Company was a wise or an unwise enactment, it is conceded that when we reach its true intent and meaning, the clause with such intent and meaning attached to it constitutes a contract between the state and the Company; and the Attorney General very frankly and properly concedes this in his brief. The language of this brief renders unnecessary any citation of authority or further discussion of the question, and is as follows:

"In order to simplify the case and meet squarely the issue raised, let it be remembered that the State, at the threshold of the argument, concedes that the legislature at the time that complainant's charter was granted, had the right to forever exempt or limit the tax rate of the corporation. Therefore the State concedes the right of complainant to insist that the provision in its charter is a contract and that all rights conferred under the provision in question should be faithfully respected and enforced. There are no differences between us as to the duty of the State to be bound by the provisions of the charter it granted, for it is conceded in the light of authority its charter is a contract, and that it could not impair it even if it wished to do so, by virtue of the inhibition of the Federal Constitution; but there is a difference between us, which difference consists in '*What is the grant?*'"

So that, when we reach the intent of the lawmakers of the State in 1833 as to what should be the limit of taxation of this corporation, that is the limit at this time. What, in my judgment this limit is, has been stated above.

This question can never arise as to charters granted since January 1st, 1863, when the Code of Georgia went into effect, which declared that in all cases of private charters thereafter granted, the State reserved the right to withdraw the franchise, unless such right is

expressly negatived in the charter. This is strengthened by the provision of the Constitution of 1877 against irrevocable grants of special privileges and immunities. But as to charters granted prior to January 1st, 1863, they must stand as written, for the reasons hereinbefore stated.

The rule in determining the meaning of statutes exempting from, or limiting taxation is strict construction against the grant and in favor of the government; but by such strict construction is meant that the language of such act will not be extended beyond its necessary meaning, and not that its necessary meaning shall be ignored and defeated.

Counsel in this case have not differed as to what part of the railroad lines is covered by this taxing clause in the charter so that can be easily fixed in the decree.

As to taxing the accumulations of money, I think the true rule is as expressed by Judge McCay in 54 Ga., as follows: "As to the surplus kept on hand, or any investment not strictly within the enterprise contemplated in the charter, we are clear that this is taxable. The company is only exempt on the value of its road and its necessary appurtenances, and those appurtenances must
34 be the ordinary and usual appurtenances of such an enterprise. Anything in the nature of an investment not within this scope, is not exempt. We would not inquire closely into the *status* of affairs on any particular day, as it may well be that it may have a surplus on hand for a special purpose. But even as a fund to meet contingencies, we think a permanent surplus invested, is not covered by the exemption in the charter."

Applying the rule thus stated, counsel should have little difficulty in framing the decree properly in this respect.

The stock subscribed under the act of 1868 authorizing the "Clayton Branch" is undoubtedly subject to taxation at the ordinary rate. This court, however, cannot properly determine what is a fair value for taxation. That can be determined in the manner provided in the State law, and as is usual in such cases.

A decree may be entered in accordance with the views herein expressed.

This the 28th day of September, 1904.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office 29th day of Sept., 1904.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

35 *Intervention of Wilkes County, Georgia.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING CO.
vs.
WM. A. WRIGHT; WILKES COUNTY, GEORGIA, Intervenor.

Comes the county of Wilkes and leave of the Court to intervene in the above numbered and entitled cause being first had and obtained, files this its intervention therein, and thereupon petitioner shows:

To the Judges of the Circuit Court of the United States, for the Northern District of Georgia, sitting in equity:

I. Intervenor is a duly qualified and constituted county of the State of Georgia, the complainant a corporation and citizen of Georgia and the defendant a citizen of Georgia and resident of the Northern District thereof.

II. Intervenor, as such county as aforesaid, is entitled to its proper, uniform and *ad valorem* tax upon all property within its confines.

III. Among the property so subject to its tax is the branch railroad from the town of Washington, Wilkes county, to the County line of Talliaferro county, into which county and to the town of Barnett therein said branch road extends, the said branch road being the property of the complainant in original bill.

IV. The said complainant has heretofore refused and still refuses to return for taxation or pay to complainant any tax whatever upon said branch railroad.

V. Complainant in original bill is due the intervenor its taxes upon said road from the year 1897 up to the present time, inclusive. These taxes complainant has refused and still refuses to pay, claiming to base its refusal upon an alleged tax exemption under the charter of said complainant. Intervenor asserts that no exemption whatsoever now exists or has ever existed as to said branch railroad or any stock issued or property owned, held or connected therewith under any act chartering or authorizing said road, nor is
36 same in any manner exempted under the charter of complainant in original bill or under the laws of the State of Georgia, but avers, on the contrary, the statutes and laws of the State of Georgia now declare and have at all times declared said railroad to be taxable in the same manner and to the same extent as other property within said county.

VI. Intervenor further avers that the charter amendment of complainant in original bill (Acts of Georgia 1849-50 page 239) under which complainant was vested with what legal rights it has in con-

nection with said road, declared in terms that no exemption should exist in the matter of the taxation thereof; that under the subsequent act authorizing the Washington Rail and Plank Road Company to construct said railroad (Acts of Georgia 1850, page 219) no exemption was given.

VII. Said right of way was purchased and said road was authorized and constructed under the authority of said acts alone, and it was thereunder, and under all subsequent laws of Georgia, subject to taxation like other property in said Wilkes county.

VIII. Intervenor asserts that had said branch road been exempt under prior acts, which intervenor here denies, the consolidation of such branch road and the Washington Rail and Plank Road Company with complainant, under complainant's charter and the act authorizing such consolidation (Acts of Georgia 1851-2, page 120) specially revoked any previous exemption which said branch road or the complainant or others may have theretofore asserted or claimed as to said road. The charter amendment heretofore specified of complainant in original bill together with said act authorizing consolidation, deny any and all exemption from taxation to complainant in original bill so far as said branch railroad & any stocks issued or property owned or held in connection therewith is concerned. Said branch road was consolidated with complainant in original bill and acquired, held and operated by it only under and by virtue of said acts.

IX. Intervenor further avers that any exemption which may have existed under the charter and amendments of complainant, which exemptions intervenor asserts do not now nor have they ever applied to said branch railroad, were only for the term of thirty six years from the completion of the main line of said complainant from Augusta to a point in said charter specified, which road was so completed about the year 1845, that is to say from the years 1846
37 to 1882, inclusive, and that since the year 1882 no exemption whatsoever has existed under the charter of complainant in original bill.

X. Intervenor further submits that the right to exclusive use by complainant of said Georgia railroad and roadway was only for the period in the preceding paragraph specified, that is until the year 1882; the State of Georgia and the counties through which said road runs having concurrent rights in and to said road and the use thereof; that said complainant can and has exercised exclusive use of said railroad only under such terms and conditions as the state of Georgia and said counties may fix, and particularly with reference to the taxes levied or permitted under the laws of the State of Georgia.

XI. On the — day of January, 1904, complainant filed its bill herein for injunction against the defendant, seeking to restrain the defendant from the issuance of any tax executions based upon the assessment under the act of the legislature of Georgia, commonly known as the 'franchise tax act' and further to restrain the defendant from issuing any tax executions or *fi. fas.* whatsoever against said complainant, and whereupon this honorable court passed the following order:

"Upon considering the bill of complaint in the above stated cause, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a. m. or so soon thereafter as counsel can be heard at the United States Court house in the city of Atlanta, Georgia, why the injunction prayed for thereunder should not be granted; and in the mean time until the further order of the Court the said defendant Wm. A. Wright is restrained as prayed for in said bill."

which restraining order is still outstanding in full force and effect and said defendant thereunder enjoined from issuing the certificates and executions to which this intervenor is entitled.

XII. Tax executions upon railroad property in the State of Georgia are and must be, as required by law, issued by the Comptroller of the State and by him delivered to the several counties entitled to the same, including executions upon said branch railroad and the property of said complainant, to which intervenor is entitled.

XIII. The defendant in original bill is Comptroller of the State of Georgia and said injunction and restraining order prevent him from exercising the functions of his said office and issuing the executions upon said branch railroad and the property held in connection therewith, to which intervenor is entitled. Intervenor has applied to said comptroller defendant in original bill, for its
38 proper certificate and tax executions against complainant and said property embraced by said branch railroad for the years from 1897 to date, inclusive, which defendant under the restraining order heretofore set forth declined and still declines to do, said defendant asserting that under said order he is forbidden to issue any executions whatsoever in the premises.

XIV. By reason of said injunction and restraining order intervenor is denied its taxes, its tax execution and the collection of its taxes now due by complainant and outstanding against said branch railroad.

Wherefore intervenor prays that said order be revoked or so modified as to permit the defendant in original bill to issue to intervenor the tax executions and certificates as hereinbefore set forth, that said defendant be authorized to issue same, that intervenor be no longer hindered in any manner in the collection or enforcement of its taxes under the suit herein and for such other and further relief as may to the court seem meet and proper.

And your intervenor will ever pray.

F. H. COLLIER,
LIGON JOHNSON,
WM. WYNNE,
Att'ys for Intervenor.

STATE OF GEORGIA, *County of Wilkes:*

D. S. Standard being duly sworn on oath says that he is Commissioner of Road & Revenues of Wilkes county, intervenor in the foregoing and hereinbefore styled cause; that he has read the foregoing intervention and that same is true of his own knowledge

except as to matters stated upon information and belief and those he believes to be true.

D. S. STANDARD, *C. R. & R.*

Sworn to and subscribed before me this 9th day of March 1906.

F. W. GILBERT,
Notary Public, Wilkes Co., Ga.

Order.

Let the intervention be filed without prejudice and served upon the Georgia Railroad & Banking Co. by their solicitor of record.

This March 14th, 1906.

WM. T. NEWMAN,
U. S. Judge.

39 Filed in Clerk's office March 14th, 1906.

O. C. FULLER, *Clerk.*

Service.

Served copy of foregoing intervention upon Alex C. King, of King, Spalding & Little this 19th day of March 1906, they being solicitors of record for the Georgia Railroad & Banking Co.

LIGON JOHNSON.

40 *Demurrer of Wilkes County, Georgia.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT ET AL.

Now comes the defendant Wilkes County Ga. by leave of the Court and hereby adopts the demurrers and pleas herein of file of the defendant, Wm. A. Wright, as its own and as fully and completely as if the same were specified, reiterated and filed in exact words.

F. H. COLLIER,
WM. WYNNE,
LIGON JOHNSON,
Attorney- for Wilkes County, Ga.

Filed in Clerk's Office 3rd day of July 1907.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy Clerk.*

41 *Answer of Wilkes County, Georgia.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA R. R. & BKG. CO.
vs.
WM. A. WRIGHT ET AL.

Comes Wilkes County Ga. defendant herein by leave of the Court, its demurrer and pleas herein having been over-ruled, and files its foregoing petition of intervention herein as its answer in this case.

F. H. COLLIER,
WM. WYNNE,
LIGON JOHNSON.
Att'gs for Def't Wilkes Co. Ga.

Filed in Clerk's Office 3rd day of July 1907.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

42 *Intervention of Taliaferro Co., Georgia.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING CO.
vs.
WM. A. WRIGHT; TALIAFERRO COUNTY, GEORGIA, Intervenor.

Comes the county of Taliaferro and leave of the Court to intervene in the above numbered and entitled cause being first had and obtained, files this its intervention therein, and thereupon petitioner shows:

To the Judges of the Circuit Court of the United States, for the Northern District of Georgia, sitting in equity.

I. Intervenor is a duly constituted and qualified county of the State of Georgia, the complainant a corporation and citizen of Georgia and the defendant a citizen of Georgia and resident of the northern district thereof.

II. Intervenor, as such county as aforesaid, is entitled to its proper, uniform and *ad valorem* tax upon all property within its confines.

III. Among the property so subject to its tax is the branch railroad from the town of Barnett upon the main line of the Georgia

Railroad, to the county line of Wilkes County, into which county and to the town of Washington said branch railroad extends, the said branch railroad being the property of complainant in original bill.

IV. The said complainant has heretofore refused and still refuses to return for taxation or pay any tax whatever upon said branch railroad.

V. Complainant in original bill is due intervenor its taxes upon said road from and for the year 1897 up to the present time. These taxes complainant has refused and still refuses to pay, claiming to base its refusal upon an alleged tax exemption under the charter of said complainant. Intervenor asserts that no exemption whatsoever now exists or has ever existed as to said branch railroad or any stock or property owned, held or connected ther-with under any act chartering or authorizing said road, nor is same in any manner exempted under the charter of complainant in original bill or under the laws of the State of Georgia, but avers on the contrary, the statutes
43 and laws of the State of Georgia now declare and have at all times declared said railroad to be taxable in the same manner and to the same extent as other property within said county.

VI. Intervenor further avers that the charter amendment of complainant in original bill (Acts of Georgia 1849-50, page 239) under which complainant was vested with what legal authority in connection with said branch road, declared in terms that no exemption should exist in connection with the taxation thereof; that under the subsequent act also authorizing the Washington Rail and Plank Road Company to construct said road (Acts of Georgia 1850, page 219) no exemption was given.

Said road was authorized and constructed under the authority of said acts and said acts alone, and it was thereunder and under all subsequent laws of Georgia subject to taxation like other property within said county.

VII. Intervenor asserts that had said branch road been exempt under prior acts, which intervenor here denies, the consolidation of such branch road and the Washington Rail and Plank Road Company with complainant, under complainant's charter and the act authorizing such consolidation (Acts of Georgia 1851-2, page 120) specially revoked any previous exemption which said branch road or the complainant or others may have theretofore asserted or claimed. The charter amendment heretofore specified of complainant in original bill together with said act authorizing consolidation deny any and all exemption from taxation to complainant in original bill so far as said branch railroad and any and all stock issued or property owned or held in connection therewith. Said branch road was consolidated with complainant in original bill and acquired, held and operated by it only under and by virtue of said acts.

VIII. Intervenor further avers that any exemption which may have existed under the charter and amendments of complainants, which exemptions intervenor asserts do not now nor have they ever applied to said branch railroad, were only for the terms of thirty six years from the completion of the main line of said complainant

from Augusta to the point in said charter specified, which road was so completed about the year 1845, that is to say from the years 1846 to 1882, inclusive, and that since the year 1882 no exemption whatsoever has existed under the charter of complainant in original bill.

IX. Intervenor further submits that the right to exclusive
44 use by complainant of said Georgia railroad and roadway was only for the period in the preceding paragraph specified, that is until the year 1882, the State of Georgia and the counties through which said road runs having concurrent rights to said road and the use thereof; that said complainant can and has exercised exclusive use of said railroad only under such terms and conditions as the state of Georgia and said counties may have fixed and particularly with reference to the taxes levied or permitted under the general law of the State of Georgia.

X. On the — day of January 1904, complainant filed its bill herein for injunction against the defendant, seeking to restrain the defendant in the issuance of any tax executions based upon the assessment under the act of the legislature of Georgia, commonly known as the 'franchise tax act' and further to restrain the defendant from issuing any tax executions or *fi. fa.'s*, whatsoever against said complainant, and whereupon this honorable court passed the following order:

"Upon considering the bill of complaint in the above stated cause, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a. m. or so soon thereafter as counsel can be heard, at the United States Court House in the city of Atlanta Georgia, why the injunction prayed for thereunder should not be granted; and in the mean time until the further order of the court the said defendant Wm. A. Wright is restrained as prayed for in said bill"

which restraining order is still outstanding in full force and effect and said defendant thereunder enjoined from issuing the executions to which intervenor is entitled.

XI. The tax executions upon railroad property in the state of Georgia are and must be, as required by law, issued by the Comptroller of the state and by him delivered to the several counties entitled to the same, including executions said ranch railroad and property of said complainant to which intervenor is entitled.

XII. The defendant in original bill is Comptroller of the State of Georgia and the said injunction and restraining order prevent his exercising the functions of his said office and issuing the executions upon said branch railroad and property held in connection therewith to which intervenor is entitled. Intervenor has applied to said Comptroller, defendant in original bill, for its proper certificate and tax execution against complainant and said property embraced by said branch railroad as aforesaid for the years from 1897 to date, inclusive, which defendant under the restraining order here-
45 tofore set forth refused and still refuses to issue, said defendant asserting that under said order he is forbidden to issue any executions whatsoever in the premises.

XIII. By reason of said injunction and restraining order intervenor is denied its taxes, its tax execution and the collection of its taxes now due by complainant and outstanding against said branch railroad.

Wherefore intervener prays that said order be revoked or so modified as to permit the defendant in original bill to issue to intervener the tax executions and certificates as hereinbefore set out and that said defendant be authorized to issue same and for such other and further relief as may to the court seem meet and proper.

And your intervener will ever pray.

S. H. SIBLEY,
J. H. BEASLEY,
HOWES CLOUD,
LIGON JOHNSON,
For Intervener.

STATE OF GEORGIA, *County of Taliaferro:*

C. W. Caldwell being duly sworn on oath says that he is one of the Commissioners of Roads and Revenues of Taliaferro county Georgia, intervener in the foregoing and hereinbefore styled cause; that he has read the foregoing intervention and that the same is true of his own knowledge except as to matters stated upon information and belief and those he believes to be true.

C. W. CALDWELL.

Sworn to and subscribed before me this — day of March 1906.

C. H. GOLUCK,
Clerk Supr. Court, Taliaferro Co., Ga.

Order.

Let this intervention be filed without prejudice and served upon the Georgia Railroad & Banking Co. by their solicitors of record.

This March 14th, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office March 14th, 1906.

O. C. FULLER, *Clerk.*

46 *Service.*

Served copy of foregoing intervention upon Alex C. King of King, Spalding and Little solicitors of record of the Georgia Railroad & Banking Co. this 19th day of March 1906.

LIGON JOHNSON.

7 *Answer of Taliaferro County, Georgia.*

n the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BKG. CO.
vs.
WM. A. WRIGHT.

Comes the defendant Taliaferro County Georgia, its demurrers nd pleas herein having been over-ruled and files this petition of ntervention herein as its answer in the cause.

S. H. SIBLEY,
J. H. BEASLEY,
HOWES CLOUD,
LIGON JOHNSON,
Attorneys for Deft Taliaferro Co. Ga.

Filed in Clerk's Office 3rd day of July 1907.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

8 *Demurrer of Taliaferro County, Ga.*

n the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT ET AL.

Now comes the defendant Taliaferro County Ga. by leave of the Court and hereby adopts the demurrers and pleas herein of file of the defendant Wm. A. Wright as its own and as fully and completely as if same were specified, reiterated and filed in exact words.

S. H. SIBLEY,
J. H. BEASLEY,
HOWES CLOUD,
LIGON JOHNSON,
Attorneys for Taliaferro County Georgia.

Filed in Clerk's office 3rd day of July 1907.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

49 *Order Making Wilkes and Taliaferro Counties Party Defendants.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT; TALIAFERRO COUNTY, GEORGIA, WILKES COUNTY, GEORGIA, Interveners.

Upon motion and without objection, it is ordered that the interveners Wilkes and Taliaferro Counties, Georgia, may be, and they are hereby made party defendants herein; that they may be, and are hereby permitted to adopt the demurrers and pleas of the defendent Wm. A. Wright, as their own, and that their petitions of intervention may be, and are hereby permitted to be filed by said Wilkes and Taliaferro Counties as their answers in this cause.

This the 3 day of July 1907.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's office 3rd day of July 1907.
O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

50 *Order Overruling Demurrers.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. —. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General; COUNTY OF WILKES & COUNTY OF TALIAFERRO.

The demurrers of the defendants to the bill of complainant coming on for hearing, and counsel being fully heard, it is now

Ordered and adjudged by the court that said demurrers be each and all overruled, and that defendants answer over.

This the 3rd day of July, 1907.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office 3rd day of July 1907.
O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

51 *Order Overruling Special Pleas.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. —. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General; COUNTY OF WILKES & COUNTY OF TALIAFERRO.

The special pleas of the defendants to the bill in this case coming on for hearing, and counsel having been fully heard, it is ordered that the said pleas be each and all overruled.

This the 3rd day of July 1907.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office 3rd day of July 1907.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

52 *Stipulation of Counsel.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

GEORGIA R. R. & BANKING CO.
vs.
W. A. WRIGHT, COUNTIES OF WILKES & TALIAFERRO.

There being some doubt as to the proper practice in entering an appeal in this case, it is stipulated among the parties hereto by their respective solicitors that no objection or exception will be taken to any appeal because the same is joint, when it should be several, or *vice versa*, such question being hereby waived.

This July 3, 1907.

JOS. B. CUMMING,
Complainant's Solicitor.
JNO. C. HART,
For Defendant W. A. Wright.
LIGON JOHNSON,
For Defts Wilkes and Taliaferro Counties.

Filed in Clerk's Office 3rd day of July 1907.

O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy.*

53 *Answer of Wm. A. Wright.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT.

The answer of the above named defendant to the bill of complaint of the above named plaintiff.

This defendant now and at all times hereafter saving to itself all and all manner of benefits of exception or otherwise that can or may be had or taken to the errors, uncertainties or imperfections in said bill contained, for answer thereto, says:

1. Respondent admits as true the allegations contained in paragraphs 1 and 2 of complainant's bill as to citizenship and residence of the parties therein named, and that the amount involved exceeds the sum of $2,000.00; but denies that the controversy arises under the Constitution or laws of the United States.

2. Respondent admits as true the allegations in paragraphs 3, 4, 5, 6, 7 and 8, containing a recital of the historical facts connected with the formation and creation of complainant.

3. Respondent believes and hence admits as true the allegations in paragraph 9 as to the length of the main railroad and its branches, that is to say the total length of complainant's road is 229 miles.

4. Respondent denies the allegations in paragraph 10 contained. Respondent admits that subscribers for stock of said railroad in payment of their said stock paid to said corporation $4,156,000.00 and that this sum went into the purchase of right of way, rolling stock, equipment and improvements, together with other large sums received from income, profits, rents and surplus, the banking business of complainant, and other sources. Respondent avers the total value of the property of complainant amounts to the sum of $11,000,000.00 which property and value is separate and distinct from the shares of stock owned and held by the stockholders of

54 complainant. Respondent denies that said stock is invested in said property or otherwise, but avers that said stock is owned and held by the various shareholders of said road. Respondent denies that the payments for stock or any other funds were invested in the franchises of said corporation, but avers that the same were granted without consideration, from the State, other than to create subject to its right to tax same under its general power. Respondent further denies that the 440 shares of stock admitted by the complainant, as liable to taxation, are of the value of $44,000.00 but avers the same to be of the value of $118,800.00. Respondent denies that the net earnings of the property of said road constitutes the basis of any taxation, but submits that said property is taxable in the same manner and at the same rate as property in the State

of Georgia, and that said charter exemption was only intended for and applied to the shares of stock in the hands of the shareholders and owners thereof.

5. Respondent further answering says that the original capital subscribed, to wit; $1,156,000.00 was invested in pursuance of the charter and that section 15 is a covenant made between the State and the stockholders in said corporation and by which contract the rate of taxation on the "stock" is fixed and inviolate. Respondent admits that the State is bound by the contract as therein expressed, viz: "that the stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any one of them; and after that shall be subject to a tax not exceeding one-half of one per cent. per annum on the net proceeds of their investments". But respondent denies by the terms of said contract that the contention and conclusion of complainant is true in its assertion and claim as set forth in paragraph 11, that the State bound itself never to impose and levy a direct tax on the property in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property, one-half of one per cent. on the net proceeds of said investments. Respondent insists that the covenant made was with the stockholders and the limitation of the tax rate was upon the shares of stock in his hands, and denies that the covenant was a limitation of the tax rate on the property of the corporation or its net income, and says that said property is liable as such to an ad valorem tax as all other property in the State of
55 Georgia, not exempted by the Constitution.

6. Respondent believes it to be true as alleged in paragraphs 12 and 13 of complainant's petition that it has, whenever it has earned a net dividend, paid the State taxes on the basis of net income, but denies that its immunity from taxation on its property has been due alone to that construction of the contract and for that length of time, for it has been of only recent date that any railroad property in Georgia was taxed "ad valorem." The Act taxing railroad property in Georgia "ad valorem" for State, county and municipal purposes began first in 1874 for State purposes, and culminated in 1888 for State, county and municipal taxation.

7. Respondent admits the allegations in paragraph 14 touching the return of complainant's property for taxation and the refusal of respondent as Comptroller General of the State to receive the return on the basis of one half of one per cent. on the net proceeds of the railroad company's investments and he demanded that the property should be returned for taxation at its true market value and still insists that the property of the railroad company as such is liable to taxation as other property in Georgia, to wit, ad valorem.

8. The allegation in paragraph 15 as to the passage by the General Assembly of the Act entitled "An Act to provide for and require the payment of taxes on franchises, and to prescribe the method of payment and return of said taxes", is true.

9. Respondent also admits as alleged in paragraph 16 that complainant made the return marked exhibit B in his original petition

under protest except as to the $44,000.00 as aforesaid, which it admits is subject to a property taxation. Respondent denies that a return of $44,000.00 as representing the subscription of stock of said company under the Act of 1868 was a fair and just return, but that said stock being worth now $270.00 per share it should have been returned at $118,800.00 as so much property for taxation at the general rate.

10. Respondent admits the allegations in paragraph 17, that complainant has offered to pay one-half of one per cent. on the net earnings of the railroad company, and that respondent has refused to accept this payment and insists that complainant is liable for taxation on its property at the general rate fixed by the State for State purposes and the rates fixed by counties and municipalities through which complainant operates its said railroad and that the property and franchises of said railroad company are liable to taxation at such combined rate.

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11. Respondent denies the allegations in paragraphs 18 and 19, that the railroad property and its branches are exempt from taxation in excess of one-half of one per cent. on its net earnings and further denies that the Constitution of the State and the laws in pursuance thereof making liable to taxation its property, impair the obligation of the *market* contract of complainant; it being the insistence of respondent that by section 15 of the Act of 1833 chartering said company, the contract was with the stockholder and related solely to the shares of stock, and was not a contract not to tax the property of the complainant.

12. Respondent admits the allegation in paragraph 20, that he was seeking to collect the excess in value of complainant's property over and above the original subscription, which excess in value, according to the return of complainant is $1,999,756.00 and is liable to taxation at the general rate; and he now insists not only such excess is liable to taxation ad valorem and at the general rate, but that all of complainant's property is liable to taxation ad valorem and at the general rate fixed upon other property.

13. Respondent admits the allegations in paragraphs 21 and 22, viz: that he insists that the franchises of complainant is liable to State, county and municipal taxation and he admits that he was proceeding and would have collected the taxes thereon at the general rate levied on property in this State except for the restraining order of this Honorable Court, believing and insisting that said property is so liable for taxation as other property in this State.

14. Respondent admits the taxes demanded by him of the complainant are in excess of one half of one per cent. on the net earnings of the complainant, but denies that the charter of complainant is a contract between the complainant and the State not to demand an ad valorem tax on the property of the complainant. Respondent believes to levy a tax on the stock of the shareholders in excess of one half of one per cent. on their net investments would be to impair the obligation of the legislative contract, but he is not seeking to levy and collect any tax whatsoever upon the stock of the share-

holder, but he was proceeding to levy and collect taxes on
57 the property of the complainant at the rate fixed by law upon all other property in this State.

15. Respondent further answering says it is not true as alleged in paragraph 24 that he has demanded that the property of complainant shall be returned at a higher valuation than other species of property in the State is returned for taxation and he denies it to be the practice of taxing officers of this State to receive other species of property of citizens of this State for taxation at a less percentage than the property of railroads is required by this respondent to be returned for taxation. Further answering says that if any officer charged with the duty of receiving property for taxation in Georgia treats railroad property as to valuation otherwise than all other property is treated, that such officer does so in violation of law, for it is expressly provided by the Constitution of this State that all taxes shall be uniform and ad valorem.

16. Respondent admits the allegations in paragraph 25 relative to the returns of property for taxation by railroad companies, but denies the conclusion reached by complaint in paragraph 28, that the owners of said railroad property in being required to comply with the law touching the return of "franchises" for taxation, has, or is, being denied the equal protection of laws.

17. Respondent further answering says as alleged in the original petition that he is the Comptroller General of the State of Georgia, and as such it is his duty to require and receive the returns of railroad property for taxation. He has proceeded to assess and collect the taxes due by the complainant to the State of Georgia on its property and franchises, when restrained by this Honorable Court. It is the insistence of respondent that under the provision in question, to wit; section 15, of complainant's charter, that the covenant touching taxation was and is a contract between the stockholder and the State and related to the shares of stock. He prays the Court, since it now has jurisdiction of this entire case, in order that respondent may properly exercise his duty in the premises as Comptroller General, that this Court will construe Section 15 of the charter of complainant, or so much thereof as relates to the subject of taxation. Respondent submits his contentions and invokes the judgment of the Court thereon as follows:

First. That the provision made in section 15, as follows
58 "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of them; and after that, shall be subject to a tax not exceeding one-half per centum per annum on the net proceeds of their investments," is a covenant that the stock or shares shall not be taxed exceeding one-half per cent. on the net proceeds of their investments, and is not a limitation of the tax rate on the property of complainant.

Second. If the Court should construe the limitation to refer to the original subscription, whether in stock or as an investment, then it is the insistence of respondent that the excess of property over and above such original subscription is liable to taxation at the general

rate. That is to say the original capitalization being $4,156,000 is liable to taxation at the rate of one-half of one per cent. on the net proceeds of the investment, and the excess of property as shown by the return of complainant, to wit, $1,999,756 is subject to taxation as so much property for State, county and municipal purposes as provided by the Act of 1874.

Third. Should the Court construe the word "stock" as meaning a covenant with the State to tax neither the stock of the shareholder or the capital stock of the company beyond the limit therein fixed, it is insisted that the element of franchise granted the company, as such is property not protected by charter, and should be taxed at the general rate.

Fourth. It is the insistence of respondent that the $44,000 represented by 440 shares of stock issued by virtue of the Act of 1868, should not be returned as $44,000 as so much stock for taxation, or as representing that much property for taxation, but since the shares of stock of said railroad company is now worth on the open market $270.00 per share, the return should be $118,800 as so much property for taxation, and it should be decreed that the complainant is liable to taxation for State, county and municipal purposes as a return of property for that amount.

Fifth. It is further insisted that the $325,000 surplus money now on hand as shown by Exhibit B under the return of the complainant, is liable to taxation as so much property at the general rate.

18. Respondent having fully answered submits that the injunction awarded against him by this Honorable Court on the — day of January, 1904 should be dissolved and that said bill ought to be dismissed with costs in this behalf expended.

59

JNO. C. HART,
Counsel for Defendant.

GEORGIA, *Fulton County:*

You, Wm. A. Wright, defendant in the above stated case do swear that the foregoing answer is true to the best of your knowledge and belief, so help you God.

WM. A. WRIGHT, *Defendant.*

Sworn to and subscribed before me this 3 day of March, 1904.

W. H. HARRISON,
N. P., Fulton Co. Ga.

Filed in Clerk's office July 3, 1907.

O. C. FULLER, *Clerk.*

60 *Amendment to Answer of Wm. A. Wright.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

THE GEORGIA RAILROAD & BANKING COMPANY
vs.
WM. A. WRIGHT.

And now, before decree in said case, and not waiving the demurrers and pleas of file in the case, but with all the reservations made in the original answer, comes the defendant, and by leave of the court amends his answer to paragraph 10 of the petition as follows, to-wit:

Defendant avers that the property of the complainant, in its return for taxation exhibited in the petition, except as to the road bed and a portion of the other realty, is not the property in which the capital of said company was originally invested, but that the rails and ties of the main lines of the tracks then constructed have been many times replaced by new ones, each time the track being made heavier and more valuable, so that the track is now worth at least double its original value, and the buildings appurtenant to said railroad have been renewed and enlarged from time to time, and new stations, depots and office buildings have been from time to time erected, so that the present value of these is many times what the value of the original buildings was; and the original engines, cars, and other rolling stock have long since been worn out or discarded, and new engines and cars and other rolling stock have been purchased, much more numerous, and many times more efficient and valuable than heretofore; that new and valuable appliances for track repairs, for removing wrecks, shops for the building and repair of rolling stock, and other tools and appliances have been from time to time purchased and added to the property of said complainant; and that while the number of miles of main line is still the same as originally, extensive purchases of additional lateral right of way have been recently made, and many miles of new side tracks constructed, and extensive yards and track facilities constructed at both termini of the road. By reason of which things defendant

61 avers that not only has the value of the property of complainant been greatly enhanced but its identity and substantial character materially changed. Defendant further avers at the close of the Civil War in 1865, the railroad of complainant was in parts wholly demolished, and much of its property swept away, and its restoration even to its original condition involved a large outlay of funds. Defendant avers that funds to make these additions and betterments were in part obtained from accumulations of profits of the complainant's enterprise which were by it reinvested therein, in part from the sale of said 440 shares of new stock in the petition mentioned, and in part from the sale of bonds of the complainant. Defendant contends that in no event should the entire present property of complainant at its present value be declared

exempt from all tax except that in the said 15th section of its charter mentioned, and defendant absolutely enjoined from collecting any other tax, but that said section should be construed, and if found to protect any of the present property of complainant from property taxation, defendant should be adjudged free to assess and tax such property and values as are not so protected, from year to year, and under such machinery as is by the laws provided.

JOHN C. HART,
Attorney General, Solicitor for W. A. Wright.

IN THE NORTHERN DISTRICT OF GEORGIA,
Georgia, Fulton County:

In person appeared before me a person authorized to administer an oath, the defendant W. A. Wright, who being duly sworn, says that he has read the foregoing amendment to his answer as well as the original answer in said case and that the statements of fact in said amendment and answer are true.

WM. A. WRIGHT.

Sworn to and subscribed before me this July 3rd, 1907.
W. H. HARRISON,
Notary Public, Fulton Co., Ga.

Order.

By special leave of the court, all parties consenting, ordered that the within amendment be allowed and considered as a part of the original answer.

62 July 3, 1907.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's office July 3rd, 1907.
O. C. FULLER, *Clerk.*

63 *Final Decree.*

In the Circuit Court of the United States for the Northern District of Georgia.

No. —. In Equity.

THE GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General.

Bill for Injunction, etc. Filed January 7th, 1904.

This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company *vs.* William A. Wright, Comptroller General, and amendments thereto and the exhibits to

the same, and the answer and amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit; the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of said Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant the Georgia Railroad & Banking Company;

That the said Charter covers complainant's main railroad between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branch railroad between Barnett and the City of Washington, in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of the appurtenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the valuation of all of said property, which valuation it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation for said property exclusive of all other taxation, to wit;—one half of one per cent. of the net earnings of said property.

That all property of complainant other than that above specified including so much of said property as is represented by four
54 hundred and forty shares of stock subscribed under the Act of Oct. 5, 1868, is liable to taxation under the general laws of the State of Georgia

It is further ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complainant not in accordance with this decree.

This the 3rd day of July, 1907.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's office 3rd day of July 1907.

O. C. FULLER, *Clerk*,
By J. D. STEWARD, *Deputy*.

55 UNITED STATES OF AMERICA:

The President of the United States to the Georgia Railroad and Banking Company and Joseph B. Cumming and A. C. King, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Northern District of Georgia, wherein William A. Wright, The County of

Wilkes, and The County of Taliaferro are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this tenth day of January, A. D. 1908, and of the independence of the United States the One Hundred and Thirty Second.

WM. T. NEWMAN,
United States District Judge, Presiding in the Circuit Court Aforesaid.

Attest:
O. C. FULLER, *Clerk.*
By W. C. CARTER,
Deputy Clerk.

Service of the above Citation, and receipt of a copy, admitted this 10 day of Jan'y, 1908.

JOS. B. CUMMING,
ALEX. C. KING,
Solicitors for The Georgia Railroad and Banking Company, Appellee, Complainant in the Lower Court.

Filed in Clerk's Office 10th day of Jan'y, 1908.
O. C. FULLER, *Clerk.*
By W. C. CARTER, *Deputy.*

[Endorsed:] Circuit Court of United States, Northern District of Georgia. The Georgia Railroad & Banking Company *vs.* Wm. A. Wright, County of Taliaferro, County of Wilkes. Citation for appeal. Filed in Clerk's office Jan'y 10, 1908. O. C. Fuller, Clerk. by W. C. Carter, Dep. Clerk.

66 *Appeal.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

THE GEORGIA RAILROAD AND BANKING COMPANY
vs.
WILLIAM A. WRIGHT and THE COUNTY OF WILKES and THE COUNTY OF TALIAFERRO.

The above named respondents, William A. Wright, The County of Wilkes, and the County of Taliaferro, considering themselves aggrieved by the order and decree made and entered in the above stated court in the above stated case, on the third day of July, 1907, whereby it was ordered adjudged and decreed that the Acts of the Legislature of Georgia of Dec. 21, 1833, and the various other acts of said legislature, passed prior to the 1st day of Jan. 1863, and constituting the charter of the complainant company, are a valid

and binding contract between the State of Georgia and the said complainant, the Georgia Railroad and Banking Company; that the same covers the roads of said complainant therein mentioned, with all appurtenances, including rolling stock and the franchise to be a corporation, without reference to the valuation of said property; that said charter provides a system of taxation of said company exclusive of all other taxation, to wit: one half of one per cent. of the net earnings of said property; and that the defendants be perpetually enjoined from levying any taxes, state, county or municipal, from complainant not in accordance with this decree—do hereby appeal from said order and decree of July 3, 1907, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

JNO. C. HART,
SAML. H. SIBLEY,
Solicitors for Respondents Wm. A. Wright.

67

LIGON JOHNSON,
SAML. H. SIBLEY,
Solicitor for Respondents County of Wilkes and County of Taliaferro.

HOOPER ALEXANDER,
Solicitor for Respondent William A. Wright.

Filed in Clerk's Office 10th day of Jan'y, 1908.
O. C. FULLER, *Clerk.*
By W. C. CARTER, *Deputy.*

Order Allowing Appeal.

The foregoing petition for appeal is granted, and the claim of appeal therein made is allowed.
This January 10th, 1908.

WM. T. NEWMAN,
Judge of the District Court for the Northern District of Georgia and Presiding in said Case.

Filed in Clerk's Office 10th day of Jan'y, 1908.
O. C. FULLER, *Clerk.*
By W. C. CARTER, *Deputy.*

68 *Bond.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

THE GEORGIA RAILROAD AND BANKING COMPANY
vs.
WM. A. WRIGHT and THE COUNTY OF WILKES and THE COUNTY OF TALIAFERRO.

Know all men by these presents that we, Wm. A. Wright, The County of Wilkes and the County of Taliaferro, as principal and R. E. Park as security are held and firmly bound unto the Georgia Railroad and Banking Company in the sum of Five hundred dollars to be paid the aforesaid, Georgia Railroad and Banking Company, its successors or assigns: to which payment well and truly to be made we bind ourselves, our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 10th Janv. 1908.

Whereas the above named respondents Wm. A. Wright, County of Wilkes, and County of Taliaferro have appealed to the Supreme Court of the United States from a decree in favor of the above named complainant, The Georgia Railroad and Banking Company rendered in the above entitled case on July 3, 1907 in the Circuit Court of the United States for the Northern District of Georgia, to reverse said final decree. Now therefore the condition of this obligation is such that if the said appellants shall prosecute their appeal to effect and answer all costs and damages that may be awarded against them or either of them if they or either of them fail to make good their appeal, then this obligation to be void; else of full force and effect.

WM. A. WRIGHT.
R. E. PARK.
COUNTY OF WILKES.
COUNTY OF TALIAFERRO.
By LIGON JOHNSON & SAML H. SIBLEY,
Solicitors.

This bond approved as to form, amount and sufficiency of securities, this 10th Janv. 1908.

WM. T. NEWMAN,
Judge United States District Court,
Northern District of Georgia.

Filed in Clerk's Office 10th day of Janv. 1908.

O. C. FULLER, *Clerk.*
By W. C. CARTER, *Deputy.*

69 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Georgia. In Equity.

THE GEORGIA RAILROAD AND BANKING COMPANY
vs.
WILLIAM A. WRIGHT, THE COUNTY OF WILKES, and THE COUNTY OF TALIAFERRO.

And now come the respondents, and file the following assignment of errors particularly stating the errors on which they and each of them will rely in the prosecution of their appeal from the decree made in the above entitled cause by this honorable court on July 3, 1907.

1. The court erred in not sustaining the first paragraph of respondent's demurrer to the bill as amended, alleging that the amended bill presented no federal question, was a suit between citizens of the same state, and the court was without jurisdiction; because by said amendment the complainant alleged that the entire cause was estopped by a former judgment therein set up, and the existence and effect of an estoppel by judgment of a state court between the same parties is not a federal question. The court should have declined to entertain the amendment, as one tending to oust the court of jurisdiction of the cause; or, having allowed it, should have dismissed the bill for want of jurisdiction.

2. The court erred in not sustaining the second paragraph of respondent's demurrer, that the complainant, by its own showing, was not entitled to the relief prayed; because the petition, construed with the public laws affecting the complainant's charter, and the constitution and laws of the State on the subject of taxation, showed upon its face that the property of complainant sought to be taxed (including its franchise) was liable to taxation, and was not exempt therefrom under the 15th section of complainant's charter as alleged, and that the respondent W. A. Wright was proceeding lawfully to collect taxes upon the same.

3. The court erred in not sustaining the third paragraph of respondent's demurrer, which attacked Paragraph 23 of the bill relating to the effort to tax complainant's franchise under the
70 Act of Dec. 17, 1902; because the franchise sought to be taxed is shown by said bill not to be a part of the property sought to be exempted from taxation by the 15th section of the charter and not to be a part of the "stock of the company" contributed by the corporators, but a value contributed by the State of Georgia; and the said act taxing such franchise is in impairment of no contract with the corporators as alleged.

4. The court erred in not sustaining the fourth paragraph of respondent's demurrer to the bill, which averred that by complainant's own showing its present property was largely in excess of the capital stock permitted by the original charter of complainant,

which excess represented accumulated profits, surplus and subsequent investments, and that such excess was not protected by the limitation on taxation in said original charter contained. The original capital stock, as shown by said charter, was $1,500,000.00. Increase to $4,000,000 was authorized from time to time under later laws. The court erred in not limiting any exemption from general taxation of complainant's property, as being the equivalent of the "stock" mentioned in the charter to said original $1,500,000 and in not limiting it to said $4,000,000 of value.

5. The court erred in not sustaining the exceptions filed by respondents to Paragraph 24 of the petition, which paragraph, for the reasons stated in said exception should have been stricken.

6. The court erred in over-ruling the plea filed by the respondents; because the decision of the Supreme Court of Georgia in the cases therein set forth was a judgment between the same parties, and was an authoritative construction of the charter of complainant, in accordance with which W. A. Wright was acting in this case. Said construction should have been sustained as an adjudication binding upon the parties.

7. The court further erred in over-ruling said plea, because the decision of the Supreme Court of Georgia therein set out was a construction and interpretation by said court in a litigation between the same parties, of the former decision of said court in the case between said parties which is relied on as an estopped by the complainant in the amendment of its bill, defining the meaning of said decision, and limiting its application. The meaning and effect of said first decision being a question of general law, and not a federal question, the construction of the same made by the court
71 of last resort of Georgia especially in a case to which complainant was a party, will be observed and respected by this honorable court.

8. The court erred in adjudging that the judgment in the case of the Georgia Railroad and Banking Company *vs.* the State of Georgia which was exhibited in the amendment of the bill was *res judicata* and conclusive of the issues in this case; because said judgment was pronounced by the courts of the State of Georgia in a contest over the taxes for the year 1874, and under the law of Georgia, the decisions of its courts in matters of taxation are conclusive between the parties only as to the taxes of the year actually involved, and the decisions of said courts will not have a wider effect when urged in the federal courts as an estoppel.

9. The court further erred in adjudging said judgment to be conclusive of the issues in this case as an estopped, because the pleadings in said former case show that the only issues involved therein were (*a*) Whether the charter of the complainant contained a valid contract of exemption from taxation, (*b*) Whether the same had been rendered repealable by the acceptance of franchises subsequent to Jan. 1, 1863 and (*c*) Whether the Act of 1874 repealing all such exemptions was effectual as to the charter of complainant; and no other issues were actually or necessarily decided. The issues arising in this case as to (*a*) Whether it was the shares of stock in the hands of the shareholders, or whether it was the capital stock paid

in by them that was protected from taxation; and (*b*) the issue whether the property of complainant is greater in value than the capital subscribed under said charter, and (*c*) whether it is not different property from that subscribed, or originally purchased, and (*d*) has not been increased by additional investment of surplus earnings and proceeds of sale of bonds; were not made and litigated in said prior case, and cannot be estopped by the judgment therein.

10. The court further erred in holding said former judgment to be an estoppel of the issue in this suit that the property of the complainant liable to taxation was greatly in excess of the capital subscribed under said charter and under the protection of its tax exemption, and that the original property had been added to and substituted by other, and that large investments of surplus earnings and proceeds of bond sales had been made; because said facts did
72 not appear in said former suit, and the "question sought to be estopped was not necessarily presented and determined upon exactly the same facts."

11. The decision of the Supreme Court of Georgia in said former case declared that the investment of the capital stock sold under the Act of 1868 was not protected by the charter. The court below erred in not adjudicating said decision to be an estoppel and conclusive that all other investments made since the original charter and the subscriptions thereunder and since 1863 whether of surplus earnings or the proceeds of bond sales or otherwise, were equally unprotected by the original charter.

12. The court erred in decreeing that the limitation of taxation in the complainants charter covered its railroad and appurtenances as mentioned in the decree regardless of their value, because—

(*a*) Under a true construction of the charter, the same limited the taxation only of the shares of stock of the shareholders, and not of the property of the corporation.

(*b*) If the property of the corporation be protected from taxation at all, the protection extends, under a strict construction of the exemption, only to such a value of property as is measured by the original "stock" authorized by and paid in on the faith of the said charter; betterments, substitutions, enlargements, and further investment of funds from whatever source, are not exempted from general taxation.

13. The court erred in decreeing that the right of complainant to be a corporation was protected from taxation beyond the limit fixed in said charter; because said franchise is taxable under the laws of Georgia, and it was in no sense a part of the "stock" contributed by the corporators on the faith of the charter, but was a valuable property contributed by the State of Georgia itself, as to the taxation of which no stipulation was made.

14. The court erred in decreeing that the charter of complainant provided an exclusive method of taxing complainants property; because (*a*) the taxation therein provided for was not of the property at all, but of the "stock" and (*b*) was not exclusive, because applying at most only to such property as represented the money paid in by the corporators, and not to additions, betterments and increases due

to other investments, or to the franchise of complainant which was contributed by the state.

15. The court erred in holding that the branch road of
73 complainant from Barnett to Washington, eighteen miles, was covered by complainants original charter and exempt from other taxation than that provided by said charter; because it was shown that said branch road was constructed under separate legislative authority granted to another company, in which no exemption from or limitation of taxation was provided and because the consolidation of said company with complainant company did not operate to extend the charter exemption from general taxation over said branch road, nor was there any consideration for a grant of such exemption at the time of said consolidation, and because the laws and constitution of Georgia do expressly impose uniform taxation thereon.

16. The court erred in adjudging that the original charter of complainant, and such tax exemptions as it may contain, apply to the branch road of complainant from Barnett to Washington, and that the amendments of complainants charter under which it received and constructed said branch road did not subject said branch road and property held in connection therewith, to general taxation.

17. The court erred in holding that complainants charter constituted a continuing and continuous contract of exemption from general taxation; and in holding that any such contract has existed or been of force since 1882; and in holding that since the year 1882 the complainant has not held said roads authorized in its charter subject to such terms and conditions as to taxation by the state and its counties as were or might be fixed by the laws of Georgia.

18. The court erred in adjudging and decreeing that the respondent Wm. A. Wright be enjoined from collecting taxes under the laws of Georgia upon said branch road from Barnett to Washington and its appurtenances; and upon the property of complainant generally in excess of the value contributed under its charter by its corporators; upon its franchise to be a corporation; and upon all the property of complainant not shares of stock in the hands of its shareholders; because the same were each liable to taxation under said laws, and not exempted therefrom under the Constitution of the United States.

In order that the foregoing assignments may be made a part of the record, respondents present the same to the court, and pray a reversal
of the decree and that such disposition be made of the cause
74 as equity and the laws of the United States require.

JNO. C. HART,
Att'y for W. A. Wright.
LIGON JOHNSON,
SAML H. SIBLEY,
Solicitors for Wilkes & Taliaferro Counties.

Filed in Clerk's office Jan'y 10th, 1908.

O. C. FULLER, *Clerk.*
By W. C. CARTER,
Dep. Clerk.

75 Circuit Court, United States, Northern District of Georgia, in Equity.

GEORGIA RAILROAD AND BANKING COMPANY
vs.
W. A. WRIGHT ET AL.

In the pleadings of the respondents in said case, reference is made to the case of "Goldsmith, Comptroller General *vs.* Georgia Railroad and Georgia Railroad Company *vs.* Goldsmith, Comptroller General, reported in the 62 Ga. p. 485 *et seq.*" and in the hearings of the case at bar the record of the cases cited were considered by agreement as exhibited in the pleadings and in evidence before the court and were passed upon by the court. The full record of said cases consists of a *fi. fa.* each for the taxes for the years 1875, 1876 and 1877 followed each by an identical affidavit of illegality and bond. The three cases thus made were consolidated and tried together, much evidence being introduced which is immaterial here. The decision of the lower court was excepted to appropriately by each side, and the decision of the Supreme Court of Georgia pronounced, which was thereafter duly made the judgment of the trial court. In order to abridge the record in the case at bar it is stipulated and agreed that the attached transcript contains all the portions of said records material to this case, and that said transcript with this stipulation be made a part of the record in this case, and be transmitted to the Supreme Court of the United States as such.

JOS. B. CUMMING,
Sol. of the Ga. R. R. & B. Co.
LIGON JOHNSON,
SAML. H. SIBLEY,
Sol's Counties Wilkes & Taliaferro.
JNO. C. HART,
SAML. H. SIBLEY,
Sol's for Wm. A. Wright.

Ordered that the foregoing stipulation, and attached transcript be made a part of the record in the case of Georgia Railroad and Banking Company *vs.* W. A. Wright, *et al.*

This January 10th, 1908.

WM. T. NEWMAN,
U. S. Judge.

76 *Transcript of Record, State of Georgia vs. Ga. R. R. & Bk. Co.*

COMPTROLLER GENERAL'S OFFICE.

State of Georgia, Fulton County, to all and singular the Sheriffs and other lawful officers of this State—

You are hereby commanded that of the goods and chattels, lands, tenements and franchises of the Georgia Railroad & Banking Com-

pany a corporation chartered and doing business in this State, you cause to be made the sum of nineteen thousand and two hundred and one 18/100 ($19201.18) dollars as its tax for the year 1875, assessed against it upon a return made by the Comptroller General of Georgia, according to law, from the best information he could procure, and the further sum of fifty seven thousand six hundred and three 54/100 dollars as penalty and costs and that you pay over said sum of money to the Comptroller General of said State, at his office in Atlanta Ga. and return thereon this execution, with your actings and doings entered thereon.

Witness W. L. Goldsmith, Comptroller General of said State under his official hand and the seal of said office.

Issued this the third day of December 1877.

[SEAL.] W. L. GOLDSMITH,
Comptroller General of Georgia.

77 Levied the within *fi. fa.* upon all that lot or parcel of land with the improvements thereon, situate, lying and being in the city of Augusta, county of Richmond and State of Georgia, bounded north by Walker street, east by Jackson street, south by Fenwick street, west by Campbell street, excepting a strip of land 90 feet wide, between Jackson and Campbell street, belonging to the city of Augusta, and known as Watkins street; also, upon all that other lot, with the building thereon, lying and being in said city, county and State, known as the Georgia Railroad Bank, bounded north by lot belonging to the estate of Molyneaux, east by McIntosh street, south by Broad street, west by lot belonging to the Augusta factory, this 28th day of December 1877.

CHARLES H. SIBLEY,
Sheriff of Richmond County.

Affidavit of illegality having been interposed by the Georgia Railroad & Banking Company, the levy is stopped.

CHARLES H. SIBLEY,
Sheriff of Richmond County.

STATE OF GEORGIA
vs.
THE GEORGIA RAILROAD & BANKING COMPANY.

Comptroller-General's Execution for Tax for the Year 1875.

No. 80. $19,201.10.
Penalty. 57,603.50.

78 The above described *fi. fa.* levied by the sheriff of Richmond county on the following property of the defendant, the said Georgia Railroad and Banking Company, to wit: All that lot or parcel of land, with the improvements thereon, situate, lying and being in the city of Augusta, county of Richmond, and State of Georgia, bounded north by Walker street, East by Jackson St. South by Fenwick street, west by Campbell street, excepting a strip

of land 90 feet wide, extending from Campbell to Jackson street, belonging to the city of Augusta, and known as Watkins street. Also all that other lot, with the buildings thereon, known as the Georgia Railroad Bank, lying and being in the city of Augusta, county and State aforesaid, bounded north by lot belonging to the estate of Molyneaux, east by McIntosh street, south by Broad street, west by lot belonging to the Augusta Factory. Levied by Charles H. Sibley, Sheriff of Richmond county on the 28th day of December 1877.

And now comes the defendant in said *fi. fa.* the Georgia Railroad & Banking Company, and says that said *fi. fa.* levied as above stated, is illegal, and is proceeding illegally; Because it says that the charter of incorporation of this defendant was granted by a public act of the Legislature of Georgia, approved December 21, 1833 by which act, in the 15th section thereof, it is provided and declared that the stock of said company and its branches shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments.

And the stock of this defendant was subscribed under said charter, and on the faith of its provisions. And the corporators accepted said act of incorporation, and organized under the same, and expended the stock of the company subscribed and paid in by the stockholders in the construction and equipment of said road and branches. And the said provision in said charter has never been repealed or changed by the consent of the defendant; but this defendant has constantly used and enjoyed and exercised the rights, franchises and immunities granted them by their said charter until the passing of the act in this illegality hereinafter complained of and ever since, unless prevented by said act and proceedings under the same.

And this defendant further says that all the property of this defendant on which said tax is assessed, on which said *fi. fa.* is issued, is the property in which the capital stock of defendant has been invested, and constitutes and is the stock of said company
79 and its branches, and the tax so assessed is a tax on said stock, and far exceeds the amount of one half per centum on the net proceeds of their investments, which last named tax for 1875 is twenty one hundred and twenty eight dollars and thirty nine cents ($2,128.39) which this defendant has already paid to the Comptroller General of this State.

And the defendant further says that there is no valid law of said State under which said tax *fi. fa.* is issued; and that the act of the Legislature, approved February 28, 1874, entitled "An Act to amend the tax laws of this State so far as the same relates to railroad companies, and to define the liability of such companies to taxation and to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act." is void and of no effect in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another or greater tax than one half per cent. per annum of the net profits of this defendant's investments, on the stock of this defendant, or the property in which said stock is invested, because said act is in conflict with the Constitution of the United States, as being an act impairing the obligation of a

contract, and therefore violates the first paragraph of the tenth section of the first article of the said Constitution of the United States.

And his defendant further says that heretofore, to wit on the 2nd day of October, 1874, the Comptroller General of the State of Georgia, issued an execution against this defendant for tax *fi. fa.* No. 6 upon its property, under the provisions of the said act above referred to, approved the 28th day of February 1874, and on the 3rd day of October 1874 the said *fi. fa.* was levied by the sheriff of Fulton county A. M. Perkerson, on the property of this defendant, and on the 20th day of October, 1874, this defendant filed its affidavit of illegality according to the provisions of the third section of said act, and in terms thereof, declaring and setting forth that said *fi. fa.* was illegal, upon the ground and for the causes above set forth in this affidavit; and that on the 17th day of December, 1874, the said illegality was tried before and by the Superior Court of Fulton County to which court the same was, by the said act, made returnable, and which court, by the provisions of said act, had jurisdiction to try said illegality; and that on the day and year last aforesaid, the said Superior Court of Fulton County, upon the trial of said cause, ordered and adjudged that the oath of illegality
80 be sustained as to all tax claimed except the tax upon four hundred and forty shares of new stock, valued at ninety-three dollars per share, being the sum of two hundred and four dollars and fifty cents and that the *fi. fa.* proceed to collect said last named sum, and the further sum of — for costs.

Which decision of the said Superior Court of Fulton county was on the 21st day of December, 1874, carried, by bill of exceptions, at the instance of both parties, to the Supreme Court of the State of Georgia, and at the January Term 1875, of said Supreme Court, the said decision of the said Superior Court of Fulton county was by the said Supreme Court affirmed, and the remitt-ur from the said Supreme Court was returned to, and made the judgment of, this Court by the Superior Court of Fulton county, which decision, the defendant says, was rendered in a cause between the same parties as are here at issue, to wit: The State of Georgia against the Georgia Railroad and Banking Company (this defendant); that the said cause embraced, and in the same was drawn in question, among other things, the same subject matter as is here drawn in question to wit: the validity of the charter of this defendant, and particularly the validity of so much of said charter as prohibits the taxing of the stock of this defendant, or imposing upon it any other or greater tax than one half per centum upon the net profits of its investments; also, the constitutionality of the said act of the Legislature, approved the 28th day of February 1874, and all amendments thereof; and also the power of the State to tax the stock of this defendant or the property in which its stock had been invested; and that the judgment rendered in said cause was rendered by a court having jurisdiction to try the same, and was rendered and said questions were adjudicated in favor of this defendant; and this defendant here pleads the same as a former — recovery and a bar to the present proceedings, and as an estoppel to prevent the State from making the same questions again, and as an end of litigation.

This defendant further says, that so much of said *fi. fa.* as is for penalty of fifty-seven thousand six hundred and three dollars and fifty cents, is illegal, because there is no law subjecting this defendant to a penalty for resisting said tax, levied and assessed under said act of February 28th, 1874. And there is no law authorizing the Comptroller General to impose on this defendant any penalty whatever for any cause existing in relation to taxes
81 due by this defendant to the State.

JOS. B. CUMMING,
HENRY HILLYER,
For the Ga. R. R. & B. Co.

STATE OF GEORGIA, *Richmond County:*

You, John P. King, President of the Georgia Railroad and Banking Company do swear that the facts stated in the above and foregoing affidavit of illegality are true.

JNO. P. KING, *Pres't.*

Sworn to and subscribed before me this 22nd day of January, 1878.

A. S. MORRIS,
Not. Pub., R. C., Ga.

GEORGIA, *Richmond County:*

Know all men by these presents, that the Georgia Railroad and Banking Company as principal and Jno. P. King as surety are held and bound unto the Governor of the State of Georgia and his successors, in the sum of one hundred and sixty thousand dollars for the payment of which they bind themselves by these presents.

In witness whereof, the said company hath caused these presents to be signed by its President, and countersigned by its cashier, and sealed with its corporate seal, and the said surety hath hereunto set his hand and seal, this 21st day of January 1878.

The condition of this obligation is that whereas the Comptroller General of the State of Georgia hath issued against the said Georgia Railroad and Banking Company an execution for taxes for the year 1875, for the sum of seventy six thousand eight hundred and four dollars and seventy-two cents ($76,804 72) alleged to be due from the said company, in the county of Richmond, and said company is about to file its affidavit of illegality to stop the proceeding of said execution.

Now if the Georgia Railroad and Banking Company shall pay said execution so issued for taxes, in case it shall be ultimately adjudged by the courts having jurisdiction of said case, that it is liable to pay the same, then this bond to be void, else to remain in full force.

Signed and sealed in the presence of
A. S. MORRIS,
Notary Public, R. C., Ga.

82 GEORGIA RAILROAD AND BANKING COMPANY.
Per JNO. P. KING, *Pres't.*
GEO. P. BUTLER, *Cashier.* [L. S.]
JNO. P. KING. [L. S.]

ATLANTA, GA., *January* 5, 1878.

To the Sheriffs and other legal officers of Georgia:

This is to certify that the Georgia Railroad and Banking Company has paid into the Treasury of Georgia, twenty-one hundred and twenty-eight 39-100 dollars ($2,128.39) same being required by charter of said corporation as its tax on net earnings, for the year ending May 1, 1875, and which under the law, entitles said corporation to file affidavit of illegality to execution issued for said year.

W. L. GOLDSMITH,
Comd. Gen'l.

83 In Fulton Superior Court, April Term, 1878.

STATE OF GEORGIA
vs.
GEORGIA RAILROAD AND BANKING COMPANY.

Fi. Fa. and Affidavit of Illegality.

And now comes the plaintiff and demurs to all the grounds of illegality taken by the defendant and prays that the said affidavit of illegality be dismissed and the *fi. fa.* ordered to proceed on the following grounds:

1st. That said *fi. fa.* was issued and is proceeding regularly and lawfully to collect the taxes due the State from the defendant, and that none of the grounds of illegality taken by defendant are sufficient in law to arrest or prevent the execution of the same.

2nd. That the defendant not having paid the taxes due the State under her Charter has no status in this court, and no right to plead anything therein.

3rd. That the exemption claimed from taxation in the 15th Section of the Act of Incorporation in 1833 being matter different from the title of the act, is unconstitutional and void.

4th. That said Act of Incorporation gave no exemption to any part of said railroad or its branches, there being no negative words excluding taxing power; but if any exemption it extended to the road to Madison only and Athens, and that all the rest of the stock of said company is by the Charter and amendments subject to taxation at the pleasure of the Legislature, subject only to the restrictions of the organic law.

5th. That said exemption, if good, never exempted but $1,500,000 of the stock of said road, and that all the rest of the stock, to wit $2,700,000 was at the passage of the act, and still is subject to taxation as well as all the bank stock, to wit: $500,000 and all other property of said road except the said $1,500,000 of stock under the said 15th section of said act. (See act of 1833.)

6th. That the stock of the Warrenton branch of said — was never exempt from taxation (See act 22nd December, 1835)

7th. If the Georgia Railroad and Banking Company ever had any

exemption from taxation that exemption did not embrace the
84 two millions of extra stock authorized by the act of 1847 amending its charter. (See act to incorporate the Savannah and Albany Railroad and amend Charter of Georgia Railroad passed 25th December 1847) Pamphlet laws of 1847. (See also acts 20th December, 1849, and February 1st. 1850, when the stock above $1,500,000 was expressly taxed.)

8th. That by the act of 20th December, 1849 and 1st February 1850 all the increased stock of said road above $1,500,000 was expressly subject to taxation by the State, and that without the acceptance of the act of 1849.

9th. That whatever exemption from taxation the Georgia Railroad and Banking Company ever had under her original Charter, and amendments up — the 21st July, 1852, was lost by the act consolidating the Washington Railroad and Plank Road Company and Georgia Railroad and Banking Company.

10th. That section of the act incorporating the Georgia Railroad and Banking Company and prescribing a limited rate of taxation upon its capital stock does not include the following property valued as follows, and owned by said road for the years 1875, 1876 and 1877, to-wit:—

For 1875.

Real Estate	$336,627.93
Banking house and lot	35,000.00
Material on hand for road	71,878.09
Interest on bonds	41,720.00
Stock, Nashville & Chatt. & St. Louis Ry	65,000.00
Rome Railroad	148,937.00
Georgia Western R. R.	1,964.67
Macon and Augusta Railroad Co.	70,000.00
Baltimore and Chas. R. R. Co. and Steamship Co.	5,000.00
N. Y. and South Carolina Steam Ship	40,000.00
Bonds Macon & Brunswick R. R. Co.	12,750.00
Bonds East Tenn. & Ga. R. R. Co.	910.00
Bonds Western Railroad of Alabama	61,100.00
Bonds Baldwin County	33,000.00
Bonds City of Macon	18,000.00
Bonds Port Royal Railroad Co.	57,993.24
Western Railroad Company of Alabama	236,676.56
85 Note of Western Railroad Co. of Alabama	20,000.00
Macon & Augusta Railroad Company	142,046.27

For the Year 1876.

Real Estate	$333,557.30
Banking house and lot	35,000.00
Materials on hand for road	59,063.60
Interest on bonds	39,030.00

Stocks.

18,000 shares Nashville & Chatt. & St. Louis R. R.	65,000.00
1,489⅜ shares Rome Railroad Co.	100,000.00
2,000 bonds Macon & Augusta R. R. Co.	10,000.00
400 bonds N. Y. and S. C. Steamship	20,000.00

Bonds.

15 Macon & Brunswick R. R. Co.	$12,750.00
70 Western of Ala. Railroad Co.	61,100.00
5 East Tenn. & Ga. Railroad Co.	910.00
10 City of Athens	1,000.00
9 City of Macon	9,000.00
66 Baldwin County	33,000.00
Western Railroad of Ala., ½ interest	356,128.51
Macon & Augusta Railroad Co.	195,869.19
Port Royal Railroad Co.	98,417.93

For the Year 1877.

Real estate	$32,940.60
Banking house and lot	35,000.00
Materials on hand for road	52,259.11
Interest on bonds	37,520.00

Stocks.

18000 shares Nashville & Chattanooga & St. Louis R. R.	$865,000.00
1,489⅜ shares Rome R. R. Co.	100,000.00
200 shares Macon & Augusta Railroad	10,000.00
400 shares N. Y. and S. C. Steamships	20,000.00

86 Bonds.

70 Western Railroad of Ala.	$61,100.00
66 Baldwin County	33,000.00
15 Macon and Brunswick R. R. Co.	12,750.00
9 City of Macon Ga.	9,000.00
10 City of Athens	1,000.00
1 East Tenn. and Ga. R. R.	510.00
Western R. R. of Alabama, purchase account	361,005.81
Coupons paid as Guarantor Macon & Augusta R. R.	249,405.54
Western R. R. of Alabama coupon account	83,670.00
Port Royal Railroad Co.	137,472.20

All of which will more fully appear by reference to extracts from the annual reports of said Georgia Railroad and Banking Company read in evidence and for which said amounts said Georgia Railroad and Banking Company is liable to the State for taxation under the acts of the Legislature of 1875, 1876 and 1877.

11th. Said Georgia Railroad and Banking Company is liable to taxation to the State from its Banking operations on the following amounts of discounted paper due said company, to wit: for 1875, $393,605.94; 1876, $137,234.11; 1877, $116,103.88.

12th. The stock of the Washington Branch Railroad, after having been consolidated with the Georgia Railroad and Banking Company, is liable to taxation by the State under the acts of 1875, 1876 and 1877.

13th. Said Georgia Railroad and Banking Company is liable to taxation for its undivided one half interest in the Western Railroad of Alabama situated and built within the limits of the State of Georgia.

14th. That said Georgia Railroad and Banking Company have not paid the tax required by law under the acts of 1875, 1876 and 1877 upon the capital stock of $44,000 upon which they were adjudged liable in 54 Georgia Reports.

ROBT N. ELY,
Att'y Gen'l for the State.
R. TOOMBS

87 STATE OF GEORGIA
vs.
GEORGIA RAILROAD AND BANKING COMPANY.

Illegality to Tax Fi. Fas. 1876, 1877, and 1875.

It is agreed that all questions of fact, as well as law, involved in said cases be submitted to his Honor, W. L. Grice, Judge Superior Court, Macon Circuit, presiding without the intervention of a jury, with the right to either party to carry the same to the Supreme Court; and that said cases be consolidated and tried together.

July 1, 1878.

J. B. CUMMING,
McCAY & TRIPPE, AND
HENRY HILLYER,
Defendant's Attorneys.
ROBT N. ELY,
Attorney General.

Agreed to:
W. L. GRICE,
Judge Presiding.

It is ordered that the within agreement be entered on the minutes of the Superior Court of Fulton County, *nunc pro tunc*, as of the date July 1st, 1878.

RICH'D H. CLARK,
Judge C. C. A., Presiding.

88 STATE OF GEORGIA
vs.
GEORGIA RAILROAD AND BANKING COMPANY.

The above stated case having by consent of counsel been referred to my decision and judgment upon both the law and facts:

It is ordered, considered and adjudged that the demurrer be overruled, that the defendant has a standing in court, and that the execution was issued illegally, and is proceeding illegally *pro tanto*, as indicated hereinafter, and that the affidavit of illegality be sustained to that extent and over-ruled; to the remaining part of it. I hold and decide upon the case now made, that the exemption from taxation given in the original charter continue as held in 54 Georgia Reports, upon all property necessary for the purpose of the incorporation. I further decide that the stock in incorporate companies situate outside of this State and held by the road is not taxable. The proof shows that the road owns real estate and a banking house which is subject to an unpaid tax for the years 1875, 1876 and 1877. Two hundred and ninety one and sixty-six hundredths dollars for each of the years 1875, 1876 and 1877 and from the proof submitted I am unable to determine whether the company owns any other property which is liable to tax and on which the tax has not been paid, and I make no determination on any property except that specified. The illegality is therefore sustained as to all of said execution except the said sum of $291.66 on one of the executions for each of the years 1875, 1876 and 1875 and they are ordered to proceed for this amount and no more, and it is further ordered that this judgment is not to be taken as an adjudication of the right of the State to proceed hereafter to collect any tax that may be due for any of said years in the other property mentioned in said demurrer, owned by the company, except that in the items of real estate and banking house.

July 6, 1878.

W. L. GRICE,
Presiding Judge.

89 Clerk's Office, Superior Court of Fulton County.

ATLANTA, GA., *July 23d*, 1878.

I hereby certify, That the foregoing pages, hereto attached, contain a true and complete transcript of the record in the case of The State of Georgia, plaintiff in error, *vs.* Georgia Railroad and Banking Company, defendant in error.

I further certify, That the Spring Term of said Court, at which said case was tried, adjourned Monday July 15th, 1878. All of which appears from the Record and Minutes of said Court.

Witness my signature and the seal of said court, affixed the day and year first above written.

JAMES D. COLLINS,
Clerk Superior Court.

90 THE STATE OF GEORGIA
vs.
THE GEORGIA RAILROAD AND BANKING COMPANY.

By the COURT:

1. That the limit on the taxing power of the State over the Georgia Railroad and Banking Company, is not expressed or indicated in the title of the act of incorporation, does not render that provision of the charter unconstitutional.
2. The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch, 54 Ga., 423. The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate, (that is, at such percentage as will yield a revenue to the State equal to one half of one per cent. on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, assess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter upon the whole value, as in no case is the general rate, that is, the rate ad valorem imposed upon property generally, to be exceeded.
3. Affidavit of illegality is not a remedy provided by law for resisting a *fi. fa.* issued by the Comptroller-General for the taxes of a railroad company, except where the assessment and *fi. fa.* are based upon a return of property made by the company for the given year. If the Comptroller-General, for the lack of the proper annual returns of the company's property, has proceeded against the company as a defaulter, assessing both tax and penalty, there may be a remedy in Equity by injunction, but the remedy at law provided by the act of 1874 as modified and continued in force by subsequent acts, does not apply.

91 BLECKLEY, *Justice:*

1. The title or caption of the act of incorporation was sufficient, for the reasons given in the Rome Railroad case, decided at the present term.

2. It seems to have been the purpose of this court to hold in 54 Ga. 423, that except as to stock issued under the amendment of 1868, authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad & Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final. It does not follow, however, that the court's attention was called to the distinction between a tax levied directly upon

stock, and a tax levied upon the property of the corporation, as to the excess in value of the property over and above the capital stock authorized by the charter and its amendments, and issued accordingly. To a kindred subject the court's attention was called, and upon it a ruling was made, namely: that the reduced rate of the charter would be restricted to the value of the road and its necessary appurtenances, and that any surplus capital kept on hand, or any investment not strictly within the enterprise contemplated in the charter, would be taxable at the general rate. This is taking a look at the property, as distinguished from stock, and the point of view is quite proper; but to arrive at the right mode of taxing the Georgia Railroad and Banking Company under existing laws (the charter provisions included) a further comparison is to be made, the amount of the stock is to be compared with the value of the property. There is a legislative longing to tax railroad property just as other property is taxed, and this is obviously a right direction for the legislative mind to take. Taxation ought to be uniform and impartial. The accident that capital is invested in this or that species of values ought to make no difference, except so far as the State's autonomy is fettered by contract. Though the power of taxation is conceded to be an attribute of sovereignty, it may, in respect to a given property or subject matter, be surrendered or limited by contract. Strange as this doctrine is in itself, and strange as it will probably seem to our pos-
92 terity, it is, for the present, law in these states, and the courts of this generation must administer it. The contract with the Georgia Railroad & Banking Company fixes the amount of the capital stock of the corporation, or provides for fixing it, and then stipulates that the stock shall not be taxed beyond a certain limit. By this, the State meant that so many dollars of wealth might be and remain subject to the restricted taxation; it did not mean that what that wealth might produce by way of appreciation of property in which it was invested, or by way of accumulated profit, should also be taxed as capital, and only as capital. The language of the fifteenth section of the original charter is as follows: "The stock of the said company and its branches, shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of them; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." We have no doubt that "one-half per cent." means one-half of one per cent. The existing laws do not tax stock as such, but they tax property ad valorem, and they seek to tax railroad property with no discrimination for or against it. The stock of the Georgia Railroad & Banking Company, in so far as the corporation is a railroad company, (not a bank,) is subject to a restricted taxation as to all stock authorized and subscribed prior to the adoption of the Code, January 1st, 1863, and this limit in date comprehends all stock except that issued by virtue of the amendment to the charter authorizing the Clayton branch. Now, stock and property ought to off set each other, dollar for dollar, so far as they both extend, *pari passu*, but as the excess of stock over property would not be taxed by a tax levied exclusively upon property, so a tax upon the excess of prop-

erty over stock is not a tax upon the stock. The rule of strict construction should be applied in administering the provision of the charter for restricted taxation. To the extent of the stock at its nominal amount, the provision must be respected, but the excess of property over that amount represents appreciation and accumulation, not stock, and is taxable at the general legal rate. In the second head-note, we have indicated with as much accuracy as possible the proper mode of taxing this corporation under existing laws. Though it has banking powers, the corporation is primarily and preeminently a railroad company, and its property as a bank should
93 be estimated for taxation with its other assets. The banking powers, as now existing seem to depend upon an act passed in 1870, and are therefore modified by the general provisions of the Code. As a bank, therefore, the corporation is not beyond the unrestricted taxing power of the State. But considered merely as a bank, its capital is non-taxable by reason of the act of 1876, which forbids any assessment whatever from the capital of any bank, and provides for taxing the stockholders on their shares of stock. There is a difficulty in applying this mode of taxation to a railroad company with banking powers, where the stock for banking and the stock for railroad operations are blended and consolidated in ownership, that is, where there is no separation of bank shares from railroad shares. The best solution of the difficulty seems to be to keep sight of the main characteristic of the corporation, and to treat the railroad side, (which in the case of this company predominates in so high a decree), as swallowing up the banking side. It is really the case of a railroad company owning a bank, and not that of a separate banking corporation owning a bank. The bank assets may be treated as a mere investment of the railroad corporation to the extent of their value, and taxable the same as the railroad and its appurtenances, or as other property held in excess of the whole capital stock. It may be worth while to explain, that the reason why we do not think there is a limit of the restricted taxation to stock actually paid in, as we rule there was in the case of the Rome Railroad Company, is owing to there being nothing said in the Georgia Railroad charter on the subject, in the taxation clause, and no reference made to other legislation which embodies that limitation. In fixing the amount of the Georgia Railroad stock, the amount of stock issued and outstanding is to govern, so that it be not in excess of the amount authorized by the charter and the amendments thereto. And it is to be remembered, also, that amounts authorized since the Code went into effect are not to be counted in any estimate for restricted taxation. This results from the settled rule that restrictions are repealable if they do not antedate the Code; and the railroad tax act of 1874 repeals whatever of exemption or restriction is repealable. We will not undertake now to determine what particular assets of the Georgia Railroad are taxable, further than we have indicated in the second head note. Let the property of the company be
94 treated, in the first instance, just as if it belonged to a natural person. Then, if the valuation exceeds the capital stock to which restricted taxation applies, let the excess be rated as if it be-

longed to a natural person. This rule is simple and easy, and we suppose there will be no serious difficulty in carrying it out. First administer the charter so far as the restricted rate goes, and then, as to the balance of the property, administer the general tax law.

3. But whether the corporation has been overtaxed or not, the court erred in the disposition made of the case. The affidavit of illegality ought to have been dismissed, for there is no law giving jurisdiction of that remedy, under the facts in the record. Affidavit of illegality is not a remedy provided by law for resisting a *fi. fa.* issued by the comptroller general for the taxes of a railroad company, except where the assessment and *fi. fa.* are based upon a return of property made by the company for the given year. The statute requires a return to be made for each year; and certainly the legislature has power to exact such a return. Why should not railroad companys make, each year, the returns which the law requires them to make? What has exemption from taxation or restrictions upon the taxing power to do with the duty of making returns? Let the returns prescribed by statute be made, and the State can and will still abide by its obligations in respect to the imposition of taxes. No company can be allowed to absolve itself from the duty of making returns. In the present instance, the Comptroller-General was left to grope in the dark as to the Company's assets. The scheme of the statute is not to leave both law and fact open, but to settle the facts by a return, and then let the company raise the question of law by affidavit of illegality. There is no presumption of law, certainly none in direct opposition to the statutory requisites for a return, that the property remains the same, or of the same value, from year to year, and for every year after the first return is made. If a company wants to avail itself of a statutory remedy, it must comply with the terms laid down in the statute. The general rule is non-intervention by the courts in the collection of taxes. By special statute, railroad companys may resort to an affidavit of illegality, but the same statute requires that they shall make a return and it points out what the return shall contain. The Georgia Railroad and Banking Company did not comply with this statute, and therefore it has no right to prosecute an affidavit of illegality, and the Superior Court of
95 Fulton county has no power to entertain the affidavit. We accordingly reverse the judgment, with direction that the affidavits of illegality be dismissed for the want of jurisdiction in Fulton Superior court, on the facts apparent in the record. There may be a remedy in equity by injunction, but that question is open, no bill having been filed.

Judgment reversed.

THE STATE OF GEORGIA
vs.
THE GEORGIA R. R. & BKG. CO.

This case came before the court upon a transcript of the record from the superior court of Fulton county, and after argument had it is considered and adjudged by the court that the judgment of the

court below be reversed, with direction that the affidavit of illegality be dismissed for the want of jurisdiction in Fulton superior court on the facts apparent in the record.

THE GEORGIA R. R. & BKG. CO.
vs.
THE STATE OF GEORGIA.

This case came on before the court upon a transcript of the record from the superior court of Fulton county, and after argument had it is considered and adjudged by the court that the judgment of the court below be reversed, with direction that the affidavit of illegality be dismissed for the want of jurisdiction in Fulton superior court on the facts apparent in the record.

96 CLERK'S OFFICE,
SUPREME COURT OF GEORGIA, *January* 8, 1908.

I hereby certify that the foregoing 29 pages contain a true copy of the *fi. fa.* for taxes of 1875, the illegality filed thereto, the consolidation thereof with two other similar cases, the demurrer to the illegalities, the decision of the trial court, and the decision of the Supreme Court, as the same appear upon the records of this court in the cases of the State of Georgia *vs.* Georgia Railroad and Banking Company and Georgia Railroad and Banking Company *vs.* State of Georgia being bill and cross bill, said cases reported in 62 Ga. Rep. p. 185 *et seq.* as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court attached, the day and year first above written.

[Seal Supreme Court of Georgia.]

W. E. TALLEY,
Deputy Clerk, Supreme Court of Georgia.

Filed in Clerk's office January 10, 1908.
O. C. FULLER, *Clerk.*
By W. C. CARTER, *Deputy.*

97 Circuit Court of the United States, Northern District of Georgia. In Equity.

THE GEORGIA RAILROAD AND BANKING COMPANY
vs.
WM. A. WRIGHT ET AL.

The attached record was considered, though not at the time actually filed, as an exhibit to the bill of complaint of the Georgia Railroad and Banking Company, in support of its contention that the exemption from taxation claimed by complainant was *res judicata*.

It is stipulated and agreed that said record be now filed and be transmitted as part of the pleadings in this case to the Supreme Court of the United States.

JOS. B. CUMMING,
Solicitor for the Georgia Railroad and Banking Company.
JNO. C. HART,
SAM'L H. SIBLEY,
Solicitors for Wm. A. Wright.
LIGON JOHNSON,
For County of Wilkes & Taliaferro.

98 *Transcript of Record, State of Georgia vs. Ga. R. R. & Bk. Co.*

THE STATE OF GEORGIA
vs.
THE GEORGIA RAILROAD AND BANKING COMPANY.

Illegality Against Tax *Fi. Fa.* Issued by the Comptroller-General of Georgia.

During the fall term, 1874 of the Superior Court of Fulton County, Georgia said cause came on to be heard before the Honorable Jno. L. Hopkins, Judge of the Superior Courts of the Atlantic Circuit, upon agreement of counsel that said Judge should decide the same "as to law and facts, without a jury, subject to review as in other cases."

Said defendant put in evidence its charter asserted to on the 31st of December, 1833 (See Pamp. Acts 1833 p. 258) the material parts of which in this case, are as follows:

It is "An act to incorporate the Georgia Railroad Company with powers to construct a rail or turn pike road from the city of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of the said company, to punish those who may wilfully injure the same, to confer all corporate powers necessary to effect said object," and to repeal a certain act passed 27th December 1831.

It provided generally for the organization of the company, procuring subscriptions for stock, securing rights of way, election of officers, purchasing and having a holding in fee simple or for years, to them and their successors, any lands, tenements and hereditaments" &c. which they might find necessary, gave them "at all times the exclusive right of transportation or conveyance of persons, merchandise and produce over said railroad or railroads" while they see fit to exercise the exclusive right provided they charge no more than certain limited rates (§12), gave a remedy against obstructing or injuring said road, and gave them the right to farm out said road to others. The fifteenth section of said act of 1833 was in these words: "Be it enacted by the authority aforesaid, that the exclusive right to make, keep up, and use the railroads and transportations authorized by this act shall be for and during the term of thirty-six years, to be
99 computed from the time when said road from Augusta to either of the points herein before designated shall be com-

pleted for transportation; provided that the subscription of stock or shares of said company to the amount of at least five thousand shares, as aforesaid, be filled up within six months from the passing of this act, and the work from or between Augusta and either of the places hereinbefore first mentioned be commenced within two years, and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty six years shall have elapsed, though the legislature may authorize the construction of other railroads for the trade and intercourse contemplated herein; nevertheless the Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep and use railroads over and through such parts of the country that shall have expired by the foregoing limitations, but the legislature may review and extend the exclusive right upon such terms as may be prescribed by law, and be accepted by said incorporated company. The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments."

The twenty-third section repealed said act of 27th of December, 1831, and enacted that "This act of incorporation shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, without special pleading. They further shows that on the 18th December 1835 (Pamp. 1835 p. 180) the General Assembly passed an act amending said charter by changing its name to the Ga. R. R. & Bkg. Company, providing "that the stock of said company shall consist of two million of dollars, one fourth of which appeal to banking purposes shall be gold and silver coin in shares of one hundred dollars each, of which capital one half may be used for banking purposes" until completion of the road to Athens &c., with privilege then to use more for banking. That the banking privilege should continue twenty five years from the completion of the Union Road, and that the act of which this is an amendment shall "remain in full force and effect in every section and clause thereof except where it conflicts with this act."

100 And further that on the 25th of December, 1847 (Acts of 1847 p. 192) said company was authorized to increase its capital to four million of dollars, but not to increase the banking capital. And that by further amendment on the 21st of January, 1852 it was allowed to consolidate with the Washington Rail or Plankroad Company. Defendant showed payment of the one half per cent tax, as averred. Here defendant closed.

The defendant's counsel admitted that said defendant has accepted the amendments passed October 5th, 1868 (Acts of 1868, p. 147) and 4th of February 1873 (Acts of 1873 p. 97) and Acts of 10th of October, 1870 (Acts of 1870, p. 106-7) and that under and by authority of said act of 1868 said defendant increased its capital stock by selling 140 shares, which were worth on the 1st of April 1874, ninety-three dollars per share. Said amendments were as follows:

An Act to increase the capital and define the powers of the Georgia Railroad and Banking Company.

Whereas, in the original charter of said Georgia Railroad & Banking Company (then known as the Georgia Railroad Company) it is provided that said company shall have the power to continue the Athens branch towards any point which may be agreed upon on the Tennessee River; and by the amended charter of said company, passed December, 1835, it is provided that the continuation of said road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted as soon as the Company shall have satisfactory evidence that the said connection can be formed; and whereas reasonable hopes are now entertained that said Cincinnati Road will be finished to Clayton at no distant day;

Section 1. Be it therefore enacted by the Legislature of the State of Georgia in General Assembly met, That the Georgia Railroad & Banking Company have the right to extend their road from or near the city of Athens to the town of Clayton, in Rabun County, and for that purpose the said company shall have and enjoy all the powers and privileges of the original charter and amendments.

Section 2. For the purposes stated in the above section, the said company may increase its capital in such form, and upon such terms as the board of directors may determine, provided said increase shall not exceed two million dollars.

Section 3. That said company may loan, on interest, any
101 surplus earnings on hand, or which may be deposited by others; provided, not exceeding 7 per cent. interest or discount shall be charged, with the usual rate of exchange on bills drawn on distant points.

Section 4. Repeals conflicting laws.

Approved October 5th, 1868.

An Act to extend, continue and renew the banking privileges of the Georgia Railroad & Banking Company of Georgia.

Section 1. Be it enacted etc. That the banking powers and privileges heretofore granted to the Georgia Railroad & Banking Company of Georgia, by an Act approved December 18, 1835, and the various acts amendatory thereof are hereby continued, renewed and extended for a further term of thirty years.

Section 2. Be it further enacted, That all laws and parts of laws militating against the provisions of this act be, and the same are hereby repealed.

Approved October 19, 1870.

An Act to amend the charter of the Georgia Railroad & Banking Company as to legalize certain aid extended by it to the Port Royal Railroad Company.

Section 1. The General Assembly of the State of Georgia do enact, That from and after the passage of this Act, the action of the stockholders and board of directors of the Georgia Railroad and Banking Company, in aiding the objects of the incorporation of

the Port Royal Railroad Company in this state, and in the State of South Carolina, by placing of the indorsement of the former company upon the bonds of the latter company, to the amount of five hundred thousand dollars, upon the terms agreed upon by both companies, be and the same is hereby legalized and recognized as binding upon the said companies, and all parties concerned, with all the terms and conditions of said contract in the same manner and to the same effect as if originally authorized by law.

Approved February 1, 1873.

Here the evidence closed.

After argument had the court sustained said oath of illegality as to all the tax claimed, except the tax upon said four hundred and forty shares of new stock, and counsel for the State then and there excepted.

And now during said term of said court comes the counsel
102 for the State and tenders this its bill of exceptions, and says that the court erred in holding that said exemption in such charter was not repealed by said tax act of 1874; and that as applied to this case and judgment thereon the tax act of 1871 violated the obligation of the contract between the State and said defendant; in holding that said exemption was still of force, and constituted a contract which the State could not repeal, and in restricting the *fi. fa.* as he did by said judgment.

And as the facts aforesaid do not appear of record counsel for the State pray that this, its bill of exceptions, may be certified as required by law, that the errors complained of may be considered and corrected.

N. J. HAMMOND,
Att'y Gen'l.
R. TOOMBS, *For State.*

103 STATE OF GEORGIA, *Fulton County:*

And now comes the Georgia Railroad and Banking Company, by its said attorneys, and on its part excepts to said judgment in so far only as the same requires said tax to be paid on said four hundred and forty shares of new stock, not complaining of the remaining and other effect of said judgment, and this defendant says the court erred in deciding that the act of the Legislature of Georgia approved February 28, 1871 entitled an act to amend the tax laws of this State so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies as may conflict with the provisions of this act, is a valid act, and not in conflict with the constitution of the United States, which declares in the tenth section of the first article thereof that "no State shall pass any law impairing the obligation of contracts," not only so as to protect old stock of said company from such taxation, (which the court did hold), but new stock also; and second that the court erred in holding that said tax was lawfully assessed on said 440 shares of new stock, and in ordering that said *fi. fa.* proceed for the collection of the sum of two hundred and four 50-100 dollars, or for any sum. But this defendant here pro-

tests that the question of whether the act of 1835, fixes the amount of defendant's capital employed in banking was not passed upon by the court. The act of 1835 was not read to the court, and the point was not made in the cause. ≠ And the defendant here excepting, as aforesaid, does so as to the recitals in said bill of exceptions above set forth, with the qualification that when tendered to the judge the same remain subject to his approval and certificate.

≠ And defendant denies that any part of its capital was or is so employed, or that there was any proof of the same.≠

The note in margin marked ≠ is added before signing.

W. H. HULL,
HILLYER & BRO.,
Defts Att'ys.

104 NOTE.—In passing upon the case I did not consider the act of December 17th, 1835. Something was said in the argument about the capital used for banking purposes, but what it was, I do not remember. I can not say, that that act, was, or was not, put in evidence.

JOHN L. HOPKINS, *Judge.*

As modified by the note.

GEORGIA, *Fulton County:*

I do certify that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the Superior Court of the County of Fulton is hereby required and ordered to make out a complete copy of the record of said case, and certify the same as such, and cause the same to be transmitted to the January Term 1875 of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

Signed by me officially this 21st day of December 1874.

JNO. L. HOPKINS.
Judge Superior Court, Atlanta Circuit.

We hereby consent that the exceptions taken by each party may be heard under this bill of exceptions and in case either party should withdraw its bill of exceptions the other shall stand as to the errors complained of by the party not withdrawing. We mutually acknowledge service and waive copies, and we waive paying costs and supersedeas bonds in like manner. Dec. 21, 1874.

W. H. HULL,
HILLYER & BRO.,
Defts Att.

N. J. HAMMONDS,
Att'y Gen'l for State.

105 (Endorsed:) No. — Supreme Court of Georgia, January Term, 1875. The State of Ga. *vs.* The Ga. R. R. & Banking Co. From Fulton County. Original Bill of exceptions. Filed in Office, 21st., Dec. 1874. J. D. Collins, C. S. C. N. J. Hammond, Att'y Gen'l. R. Toombs.

106 GEORGIA, *Fulton County:*

I, Jas. D. Collins, Clerk of Superior Court, in and for said county do certify that within and foregoing is a true, original bill of exceptions, in case of State of Georgia *vs.* Georgia R. R. & Bkg. Co., as appears of file, and that said court is now in session.

Given under my hand and seal of office this December 23, 1874.

[SEAL.] JAS. D. COLLINS, *Clerk.*

(Endorsed:) No. 24 Atlanta. Supreme Court of Georgia. January Term, 1875. Atlanta Circuit. McJ. R. June 20, 1875. State of Georgia, Pl'ff in Error, *vs.* Ga. R. R. & Banking Co. Bill of Exceptions. Filed in office Dec. 24, 1874. Z. D. Harrison.

107 COMPTROLLER GENERAL'S OFFICE.

State of Georgia, Fulton County to all and singular the sheriffs and other lawful officers of this State:—

You are hereby commanded that of the goods and chattels, lands, tenements and franchises of the Georgia Railroad & Banking Company, a corporation of this State, you cause to be made the sum of twenty three thousand eight hundred and two 07 100 dollars as its tax for the year 1874 assessed against it upon a return of its taxable property, according to law, and that you pay over said sum of money to the Comptroller-General of said State, at his office in Atlanta, Georgia and return thereto this *fi. fa.* with your actings and doings endorsed thereon.

Witness W. L. Goldsmith, Comptroller-General of said State under the seal of said office.

Issued this 2d day of October, 1874.

W. L. GOLDSMITH,
Comptroller General of Georgia.

Levied this *fi. fa.* on the house and lot in the city of Atlanta, known as the depot building and grounds of the Ga. Railroad & Banking Company, surrounding the same, situated on the corner of Alabama and Loyd Streets, containing six acres more or less, as the property of the Georgia Railroad and Banking Company, October 3rd, 1874.

A. M. PERKERSON, *Sheriff.*

Received of Hillyer & Bro. Five 50 100 dollars in full cost in this case to date, Oct. 9th, 1874.

A. M. PERKERSON, *Sheriff.*

STATE OF GEORGIA:

COMPTROLLER-GENERAL'S OFFICE,
ATLANTA, GA., *Oct.* 6, 1874.

This is to certify that the Georgia Railroad and Banking Company has paid tax on its net income for the year 1874

W. L. GOLDSMITH,
Comptroller-General.

108 *Comptroller-General Execution for Taxes.*

THE STATE OF GEORGIA
vs.
THE GEORGIA RAILROAD AND BANKING COMPANY.

No. 6 *Fi. Fa.* Issued Oct. 2, 1874. Principal, $23,802.07.

The above described *fi. fa.* levied by the sheriff of Fulton County on the following property of the defendant, the said Georgia Railroad and Banking Company to wit, the house and lot in the city of Atlanta known as the Depot Building and grounds of the Georgia Railroad & Banking Company surrounding the same, situated on the corner of Alabama and Loyd streets, containing six acres more or less, as the property of the Georgia Railroad & Banking Company. Levy dated Oct. 3rd, 1874, and signed by A. M. Perkerson, sheriff as aforesaid.

And now comes the defendant in said *fi. fa.* The Georgia Railroad and Banking Company, and says that said *fi. fa.* levied as above stated is proceeding illegally because it says that the charter of the corporation of this defendant was granted by a public act of the Legislature of Georgia, approved December 21, 1833 by which act in the 13th section thereof it is provided and declared that the stock of said company and its branches shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments.

And the stock of this defendant was subscribed under said charter, and on faith of its provisions, and the corporators accepted said act of incorporation and organized under the same, and expended the stock of the company subscribed and paid in by the stockholders in the construction and equipment of said road and branches, and the said provision in said charter has never been repealed or changed by the consent of this defendant. But this defendant has constantly used, enjoyed and exercised the rights, franchises and immunities granted them by their said charter until the passing of the act in this illegality hereinafter complained of and ever since, unless prevented by said act and the proceeding under the same. And the defendant further says that all the property of this defendant on which said tax is assessed on which said *fi. fa.* is issued is property in which the capital stock of defendant has been invested and constitutes and is the stock of said company and its branches, and the tax so assessed is

109 a tax on said stock, and far exceeds the amount of one half per cent. per annum on the net proceeds of their investments, which last named amount tax year is two thousand six hundred and ninety eight dollars and twenty five cents which this defendant has already paid to the Comptroller-General of the State.

And this defendant further says that there is no valid law of said State under which said tax *fi. fa.* is issued and that the act of the Legislature approved February 28, 1874 entitled "An Act to amend the tax laws of this State so far as the same relate to railroads companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies respectively as may

conflict with the provisions of this Act" is void and of no effect in so far as it attempts to repeal any portion of the charter of this defendant, or to impose other and greater tax than one half per cent. per annum of the net profits of this defendant's investments on the stock of this defendant, or the property in which said stock is invested, because said act is in conflict with the constitution of the United States as being an act impairing the obligation of a contract and therefore violation of the first paragraph of the tenth section of the first article of said constitution.

W. H. HULL,
HILLYER & BRO.,
Defts Attorneys.

GEORGIA, *Richmond County:*

You Jno. P. King President of the Georgia Railroad & Banking Company do swear that the acts stated in the above and foregoing affidavit of illegality are true. JNO. P. KING.

Sworn to and subscribed before me this 29th day of October 1874.
JNO. M. TALIAFERRO,
Notary Public, R. Co., Ga.

110 STATE OF GEORGIA, *Richmond County:*

Know all men that the Georgia Railroad & Banking Company as principal and Jno. P. King as security are held and firmly bound unto the Governor of the State of Georgia and his successors in the sum of fifty thousand dollars for the payment of which they bind themselves by these presents.

In witness whereof the said company hath caused these presents to be signed by its president and countersigned by its cashier, and sealed with its corporate seal, and the said security hath set his hand and seal this 29th day of October 1874.

The condition of this obligation is that whereas the Comptroller-General of the State of Georgia hath issued against the said Georgia Railroad & Banking Company an execution for taxes for the year 1874, for the sum of twenty-three thousand eight hundred and two dollars and seven cents alleged to be due from said company, and the same has been levied on property of the said company in the county of Fulton, and said company is about to file its affidavit of illegality to stop the proceeding of said execution.

Now if the said Georgia Railroad & Banking Company shall pay said execution so issued for taxes in case it shall be ultimately adjudged by the courts having jurisdiction of said case that it is liable to pay the same, then this bond to be void, else to remain in full force.

JNO. P. KING, *Pt.*
GA. R. R. & BK'G. CO.
JNO. P. KING. [L. S.]

J. A. MILLIGAN, *Cashier.*

[Seal G. R. R. Co.]

Signed and sealed in presence of
GEO. P. BUTLER,
Notary Public, R. Co., Ga.

111 *Illegality in Fulton Superior Court.*

THE STATE OF GEORGIA
vs.
THE GEORGIA RAILROAD & BANKING CO.

It is admitted that the board of directors of the Georgia R. R. & Bkg. Co. by authority of referring to the act of Oct. 5, 1868, found on page 147 of the Acts of that year voted to increase the capital stock by four hundred and forty shares, and that number of additional shares was sold, the value of which on the 1st of April, 1874 was ninety-three dollars per share. Also that the said board of directors declared their acceptance of the act of February 4, 1873, found on page 97 of the acts of that year. Also that said board, by resolution, declared their acceptance of the act of October 19th, 1870, found on pages 106-7 of the acts of that year, and that the company has done banking business under said last named act. All of which admissions may be used in the case above stated.

W. H. HULL,
Att'y for Said Ga. R. R. & Bkg. Co.

We agree that this case be now decided by Hon. Jno. L. Hopkins, Judge of the Superior Court of Fulton County as to law and facts, without a jury, subject to review in other cases.

This 14 Dec. 1874.

N. J. HAMMOND,
Att'y Gen'l.
R. TOOMBS, *For State.*
W. H. HULL,
HILLYER & BRO.,
Att'y. for Def't.

After argument had it is ordered and adjudged that the oath of illegality be sustained as to all tax claimed except the tax upon four hundred and forty shares of new stock, valued at ninety-three dollars per share, being the sum of two hundred and four 50-100 dollars, and that the *fi. fa.* proceed to collect said last named sum, and the further sum of — for costs.

This 17th December, 1874.

N. J. HAMMOND,
Att'y Gen'l.

112 GEORGIA, *Fulton County:*

I, Jas. D. Collins, Clerk of Superior Court in and for said county do certify that above and foregoing is a true and complete transcript of the record in case of State of Georgia *vs.* Geo. R. R. & Bkg. Co., as appears of record, and that said court, is now in session.

Given under my hand and seal of office Dec. 23, 1874.

[SEAL.]

JAS. D. COLLINS,
Clerk Superior Court.

(Endorsed:) No. 24 Atlanta. Supreme Court of Georgia January Term, 1875. Atlanta Circuit. State of Georgia, Pl'ff in Error, *vs.* Georgia R. R. & Banking Co. Copy of record. Filed in office December 24, 1874. Z. D. Harrison. N. J. Hammond. R. Toombs.

113 Supreme Court of Georgia, January Term, 1875.

STATE OF GEORGIA, Plaintiff in Error,
vs.
THE GEORGIA RAILROAD & BKG. CO., Def't in Error.

By the COURT:

1. By the original charter of the Georgia Railroad and Banking Company, it was, in terms, provided that "the stock of said Company and its franchises, shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that shall be subject to a tax of not exceeding one half of one per cent. per annum on the net proceeds of their investments."

Held: That under the settled rules of construction it was competent for the Legislature to grant this exemption, and forming as it does, a portion of the contract of incorporation, any repeal of it by the Legislature, without the consent of the corporation, is in violation of ART. 1, Section 10, par. 1 of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

2. None of the Acts of the Legislature of this State which have been accepted by the Georgia Railroad and Banking Company passed since the adoption of the Code, have brought said charter, so far as its investment in said road and its necessary incidents are concerned, within section 1636 of said Code of 1863.

3. The tax act of 1874 taxing the railroads of this State upon the property belonging to them, as other property of the citizens of this State is taxed, is, so far as the Georgia Railroad Company is concerned as to its railroad and appurtenances, unconstitutional and void.

4. Bonds and other property of said company not forming any part of said railroad or its appurtenances, are subject to taxation as the property of other citizens.

114 MCCAY, *Judge*, delivering the opinion.

Were this a new question I should not hesitate to hold that it was not competent for the General Assembly of this State to enter into any contract with the corporators of the Georgia Railroad and Banking Company to exempt the corporation, permanently, from taxation nor to fix a limit, beyond which the corporation should not be taxed. It is a principle deducible from the nature of Legislative bodies, that one Legislature cannot fix a limit to the Legislative power of another and subsequent Legislature. This only the people, in their sovereign

capacity can do. This is the object and function of the Constitution alone. If a new Legislative body can do this in one particular why may it not do so in another? If by a contract a Legislature may impose limits upon the power of a subsequent Legislature to tax, why may it not by contract, limit also its power to establish courts, regulate the mode of making private contracts, the making of wills, the descent of property, or any other of the Legislative duties, cast by the Constitution upon this branch of the government, established to conduct the affairs of the State? The taxing power is especially a duty, which from the nature and necessity of it, it is of the utmost importance, shall remain to each Legislature intact, as the people have in their sovereign capacity seen fit to restrict it.

This power is the very life of the State, a necessity for its very existence, since it can never be known what the future may have in store, and if by a contract, a Legislature may stipulate that one man, or one corporation shall enjoy either an entire, or partial exemption from this necessary burden, where is the hindrance to the power of one Legislature to grant, by contract, this exemption to a set of men, to the landowners, the railroad proprietors, or indeed to any extent either of persons or property.

In the early history of this country, before the subject was fully understood, and especially before the Dartmouth College case, our Legislatures moulded as they were, upon the pattern of the parliament of Great Britian, were not so careful to scan the Legislation they adopted, knowing that if evil consequences to the State should ensue, it was competent for a subsequent Legislature to undo the knot, by which the State was bound.

115 But under the disability the decision in the Dartmouth College case, puts upon the Legislative power, it now often happens that in a thoughtless hour the State, with but a nominal consideration is shorn of its most important perogatives.

It becomes, therefore, of the greatest importance to inquire if there be no limit to this capacity of one Legislature to bind another. Is the whole power of the people, the vital existence of the State, its whole Legislative capacity, capable of being thus hampered, bartered away, sold to a corporation? Where is the limit? Or is there none? Can it be that under that clause of the Constitution of the United States which forbids a State from passing any law impairing the obligation of a contract, a State Legislature has a power which enables it to put a final conclusive limit to the Legislative power of its successors?

It seems to me that this question needs a reconsideration, that the decisions of the Supreme Court of the United States upon it, which it is admitted are definite and decided, are not sustainable upon principle, and not in harmony with other well settled adjudications, involving a view different from that taken by that high tribunal. The Supreme Court of this State in Hambrick *v.* Rowe, 17th Ga. 56, held in solemn argument, that it was not competent for one Legislature to bind another, not to authorize the removal of a county seat, and in Daly *v.* Harris, 33rd Ga. (Supplement) no less a jurist and moralist than Judge Jenkins, says: governments are mere agencies established

for the security of rights, and the promotion of interest appertaining to the founders, who by common consent have become the governed.

To this end they have been invested with certain necessary powers, the exercise of which devolves upon different individuals, who in the course of time come successively in the government.

If the depository of these powers for the passing hour may alien any one of them so as to deny itself and its successor the exercise of it, all of the others may be so alienated, and the result would follow that the agency established, for specified ends, may in the discretion defeat those ends. And in Ohio Life I. & T. Co. *vs.* Debalk, Judge Taney, says:

"The powers of sovereignty confided to the Legislative body of a State are undoubtedly committed to them as a trust to be exercised to the best of their judgment, for the public good, and no one Legislature can by its own act disown its successors of any of the powers or rights of sovereignty, confided by the people to the Legislative body unless they be authorized to do so under the Constitution, under which they were elected. They cannot therefore, by *contract* deprive a future Legislature of the power of imposing any tax it may deem necessary for the public good. And in every question of this character, the question must depend upon the constitution of the State, and the extent of the power therein granted to the Legislative body."

And Mr. Justice Catron and Campbell seem by their opinions to concur in this idea.

It must however be admitted that notwithstanding their view: as well as, in spite of the decisions of some of the most respectable Courts and Judges, of the State Courts, the Supreme Court of the United States, has with tolerable uniformity, laid down and adhered to the doctrine that such an exemption is within the ordinary Legislative discretion, that it may assume the shape of a contract, and when this is the case that it is irrepealable unless expressly stipulated to the contrary. 7 Cranch 164. 3 Hen. 133. 16 Hen. 389. 18 Hen. 331 *Id.* 380. 1 Wal. 143.

As the Supreme Court of the United States is a Court of appeal from this court, on a question of this character, I feel bound to conform myself to its decision: and although I feel it to be my duty to what I deem the truth, to express my dissent from the conclusions at which it has arrived.

On the authority of these decisions we therefore decide that it is competent for the General Assembly to contract in the charter of a corporation that it shall be exempted from taxation, or as in the charter of the Georgia Railroad Company, that its tax shall not exceed ½ of one per cent. on its earnings, and that having so contracted, without reservation, it is not competent for a subsequent Legislature to violate the obligation of that contract by assessing a higher tax.

Now has there been any Legislation accepted by the company since the adoption of the Code, which puts this corporation on a footing with the Central or Southwestern Roads, so as that the tenure by which it holds its franchises and exemption is a charter granted since

the Code, and therefore capable of being withdrawn. Indeed with the exception of the Tax Act complained of, there has been since
117 1863, no legislation looking to any general operation on the charter.

The renewal of the Bank charter is doubtless within the provision of the Code making charters granted since its adoption repealable. But there is nothing in the Record showing that any portion of the capital is now employed in Banking, indeed directly the contrary is stated. The banking seems to be solely on the credit of the company.

There seems to be no doubt that the stock issued under the amendment granted to authorize the Clayton branch is within the clause. Such was the ruling of Judge Hopkins and we think he was right.

As to the surplus on hand, or any investments not strictly within the enterprise contemplated in the charter, we are clear that this is taxable. The company is only exempted on the value of its road and its necessary appurtenances, and those appurtenances must be the ordinary and usual appurtenances of such an enterprise. Anything in the nature of an investment not within this scope is not exempt. We would not inquire closely into the status of affairs on any particular day, as it may well be that it may have a surplus on hand for a special purpose. But even as a fund to meet contingencies we think a permanent surplus is not covered by the exemption in the charter.

Judgment affirmed.

Supreme Court of Georgia.

THURSDAY, *June* 17, 1875.

The Honorable Supreme Court met pursuant to adjournment.

Present, their Honors, Hiram Warner, Chief Justice and H. K. McCay and R. P. Trippe, Judges.

The following judgment was rendered:

THE STATE OF GEORGIA
vs.
THE GA. R. R. & BKG. CO.

This case came before the court upon a transcript of the record from the Superior court of Fulton County, and after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

118 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *July* 2, 1907.

I hereby certify that the foregoing pages hereto attached contain true copies of the original Bill of Exceptions, Transcript of Record, Opinion and Judgment of the Supreme Court of Georgia in the case of The State of Georgia, plaintiff in error, *vs.* The Georgia R. R. &

Banking Co., defendant in error. Said case being reported in the 54 Ga. R. p. 423, as appears from the records and files of this office.

Witness my signature and the seal of said Supreme Court hereto affixed the day and year first above written.

[Seal Supreme Court of the State of Georgia.]

Z. D. HARRISON, *Clerk.*

Filed in Clerk's Office Jan'y 10, 1908.

O. C. FULLER, *Clerk.*
By W. C. CARTER, *Deputy.*

119 *Clerk's Certificate.*

UNITED STATES OF AMERICA.
Fifth Judicial Circuit, Northern District of Georgia:

I, O. C. Fuller, Clerk of the Circuit Court of the United States for the Northern District of Georgia, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignments of error, bond and all proceedings had in cause No. 1192, wherein the Georgia Railroad and Banking Company is complainant and William A. Wright is defendant, except that the original Citation is included herein instead of a copy thereof, as fully as the same remain of record and on file in the clerk's office of the said Circuit Court.

In testimony whereof I hereunto set my hand and the seal of the said court, at Atlanta, Georgia, this the 28th day of January, A. D. 1908.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER, *Clerk.*

Endorsed on cover: File No. 21,006. N. Georgia C. C. U. S. Term No. 268. William A. Wright, Comptroller General of the State of Georgia, The County of Wilkes, and The County of Taliaferro, appellants, *vs.* Georgia Railroad & Banking Company. Filed February 6th, 1908. File No. 21,006.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 268.

Wm. A. WRIGHT, Comptroller-General of the State of Georgia; THE COUNTY OF WILKES; THE COUNTY OF TALIAFERRO,

Appellants.

VS.

GEORGIA RAILROAD AND BANKING COMPANY,

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

I. THE CASE.

The Georgia Railroad and Banking Company brought its bill in the Circuit Court to enjoin William A. Wright from enforcing, as Comptroller-General of Georgia, the tax laws of that State in alleged contravention of a partial exemption from taxation claimed under the charter of the company. The petition alleged that the company was incorporated by said State in 1833, with power to build certain railroads, that the charter was amended so as to authorize the building of other railroads, and

that under the charter and amendments it had built a railroad from Atlanta to Augusta, and branches to Athens and to Washington, all in said State, at an original outlay of $4,156,000, the authorized capital stock, which was paid in on the faith of the charter prior to January 1, 1863. On that date the Code of the State became operative, by which all future grants of corporate franchises were made revocable, unless expressly made otherwise. Subsequently, under an amendment of the charter made October 5, 1868, $44,000 additional stock was subscribed and paid in. It was alleged that the original charter of the company in its fifteenth section contained a contract for the limitation of taxation in the following words: "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments." It was alleged that this language was a contract by which the State bound itself "never to levy a direct tax upon the *property* in which said subscriptions were invested, but to receive *in lieu of all taxes and burdens* on said property one-half of one per cent. of said investments." It was alleged that no other tax had in fact been required of the company until the passage of an Act December 17, 1902, taxing the franchises of railroad and other corporations. Prior to that time, the Comptroller had accepted returns of the property of the company in which it was valued at the nominal amount of the

capital stock, $4,200,000, of which $44,000 was taxed as other property of the State, and the remaining $4,156,000 was taxed only one-half of one per cent. on the net earnings of the company. But in 1903 such a return was refused by him, and on his demand, but under protest, a return was made itemizing the property of the company, and showing property valued at an aggregate of $6,201,596.94. That thereupon the Comptroller demanded that one-half of one per cent. of the net earnings should be paid as the tax on $4,156,000 of said property and that the remaining $2,045,506 of property should pay tax as other property of the State. The Comptroller further insisted that the franchise of the company be valued and taxed under said Act. The bill alleged that the enforcement of these taxes would impair the obligation of its charter contract in violation of Paragraph 1 of Article 10 of the Constitution of the United States. It was further alleged that the value of its franchise was included in the value of its property, and to tax the franchise separately from the property would deny the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

The petition contained allegations that railroad property was unfairly valued as compared with other property, to which exception was taken, pointing out that the laws required equal taxation of all property, and ample remedy was provided by the laws for the correction of any improper valuation, and in this case the valuations were those of the

complainant itself. No action was taken in the lower court upon the exception. The allegations were denied by the answer.

The defendant filed a plea setting up a decision of the Supreme Court of Georgia at the February term, 1879, declaring that the property of the company to a value of $4,156,000 was to be taxed under the charter contract, but any value in excess thereof was taxable as other property of citizens of the State. This decision was pleaded both as a correct exposition of the rights of the parties, and as *res judicata*.

The defendant also filed a demurrer, contending that the case involved no Federal question, and was between citizens of the same State, and the court was without jurisdiction. It was also contended that on the face of the petition it appeared that the franchise of the company taxed by the Act of 1902 was not included in the exempted stock, and that the original investment of the corporators was alone protected, and not the surplus representing accumulated profits and subsequent investments.

The company filed an amendment setting up a judgment between the parties in Fulton Superior Court, affirmed by the Supreme Court of Georgia at the January term, 1875, involving taxes for the year 1874, which it was alleged determined that the charter of the company exempted all its property from general taxation except the $44,000 subscribed

under the amendment of 1868, and was *res judicata* between the parties.

The demurrer was renewed, and it and the plea were tried by the court, and it was held that the decision pleaded by the company was *res judicata*, and was unaffected by the later decision pleaded by the Comptroller; that the franchise was part of the "stock of the company" protected by the charter, and demurrer and plea were overruled.

The defendant answered, denying that the controversy as it then stood was one under the Constitution or laws of the United States. It admitted the alleged origin and history of the company. It denied that the present property of the company represented the stock originally subscribed, and averred that its present real value was $11,000,000, representing both the original subscriptions, and large additions from income, profits, rents, and banking business. It contended that the 440 shares of stock subscribed in 1868 represented and were worth $118,800, instead of $44,000 as alleged. It was averred that the charter exemption referred not to the property of the corporation, but to the shares of stock in the hands of the shareholder, and while conceding the existence of a binding contract between the corporators and the State, denied that it protected any property of the company from general taxation. It was averred that no railroad property was subject to ad valorem taxation in Georgia until 1874, and to county and municipal

taxation not till 1889, and franchises were not taxed at all till 1902. It was admitted that he was seeking to collect taxes on the excess of the property returned over the $4,156,000 of stock subscribed prior to 1863, but now contended that all the property was subject to general taxation. The answer summed up the contentions of the Comptroller as being (1) That the limitation of taxation of the "stock of the company" referred to the shares of stock, and not the property of the company. (2) That if not, the excess of property over the $4,156,000 of stock claimed to be exempt was taxable as other property of the State. (3) That the franchise is not within the exempting clause of the charter. (4) The 440 shares of stock admitted to be taxable should be taxed at their true value, $118,000. (5) The $325,000 of surplus money shown by the return is taxable.

The Comptroller amended his answer more particularly setting out how the original investment of the company was practically destroyed during the Civil War, and that its present condition of greatly enhanced value was due to the reinvestment of earnings, new stock under the Act of 1868, the sale of bonds, and otherwise, whereby the extent of side tracks, terminal facilities and right of way had been much extended, and rolling stock and accessories greatly multiplied, and the value of the property held by the company greatly increased.

The counties of Wilkes and Taliaferro, through which the Washington Branch runs, intervened,

adopting the pleadings of the Comptroller, and asserting that this branch road at all events was not within the exemptions provided in the original charter, but was subject to general taxation.

The case was submitted on bill and answers. A decree was rendered declaring that the charter of the complainant embraced in the Act of the Legislature prior to January 1, 1863, is a valid and binding contract; that it covers the railroads above named, and all the appurtenances of said railroads, including their rolling stock; also, complainants' franchise to be a corporation and other franchises, without reference to the valuation of all said property, which valuation it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said company, said excess being produced by natural increase in the value of the property, and by renewals, alterations, and betterments of the same from time to time by the complainant. The said charter provides a system of taxation exclusive of all other taxation, to-wit: one-half of one per cent. of the net earnings of said property. That all property of the complainant other than that above specified including so much of the said property as is represented by four hundred and forty shares of stock subscribed under the Act of October 5, 1868, is liable to taxation under the laws of Georgia. An injunction was granted.

II. SPECIFICATION OF ERRORS.

The errors urged in the decree and antecedent judgments are:

1. The amended bill made a case between citizens of the same State, depending upon a question of estoppel by judgment, which is not a Federal question, and the court should have repelled the amendment, or having allowed it, should have dismissed the bill for want of jurisdiction. (Assignments of Error 1).

2. Paragraph 24 of the petition should, for the reasons stated in the exceptions, have been stricken. (Assignment 5).

3. The plea of appellant setting up the decision of the Supreme Court of Georgia at the February term, 1877, as to the meaning of its former decision and the effect of appellees charter upon the State's right to tax, should not have been overruled. If not a technical estoppel, it was the construction in a case between the same parties by the court of last resort of Georgia of a former judgment, the meaning and effect of which is a matter of local law, and that construction should be followed by the Federal courts. (Assignments 6 and 7).

4. It was error to adjudge that the decision of the Supreme Court of Georgia at the January term, 1875, mentioned in the amendment to the petition, was conclusive of the issues in this case as *res judicata*, because it was a decision by the State courts in a contest over the taxes for the year 1874 and in Georgia the decisions of its courts on matters of taxation are conclusive between the parties only

as to the taxes then involved; and such decisions will have no wider effect when urged as estoppels in the Federal courts. (Assignments 8).

5. The record of said former case shows that the issues actually made and determined therein were (a) Whether appellees charter contained a contract restrictive of taxation. (b) Whether the same had been rendered repealable in toto by the acceptance of franchises subsequent to January 1, 1863. (c) Whether the Act of 1874 was effectual to repeal the contract as to stock subscribed before January 1, 1863, or only as to stock since subscribed. The issues arising in this case as to (a) Whether the contract applied to the shares of stock in the hands of the shareholders, or to the capital stock paid in by them; and (b) The issue whether the property of the appellee is not greater than said capital stock, and the excess taxable; and (c) The issue whether the increase was not due to investments of surplus earnings, and the proceeds of bond sales, as well as to sales of new stock, which would be taxable; were not made and litigated in the former case, and cannot be estopped thereby, and the court erred in holding to the contrary. (Assignments 9 and 10).

6. If there were any estoppel, the court erred in not holding that it was *res judicata* that all property values due to the investment of surplus earnings, or sales of bonds, as well as of stock subscriptions since January 1, 1863, were alike unprotected by the charter contract. (Assignment 11).

7. The court erred in decreeing that the railroads and appurtenances of the appellee mentioned therein were protected from general taxation regardless of their value, because the charter contract under a true interpretation thereof protects no property of the appellee, but only the shares of stock for the corporators. (Assignments 2, 12, 14).

8. Further, if the charter contract protects the property of the corporation from taxation at all, under a proper and strict construction thereof the protection extends only to such a *value* of property as is measured by the *amount of* "*stock*" authorized by and paid in on the faith of said charter. Betterments, enlargements, and further investments from whatever source are not protected. (Assignments 4, 12, 14).

9. The court erred in decreeing the taxable franchise of the appellee to be protected by the charter contract, because it was in no sense a part of the "stock of the company" contributed by the corporators on the faith of the charter, but was a valuable property contributed by the State herself as to the taxation of which no stipulation was made. (Assignments 3, 13).

10. The decree is erroneous in including the Washington Branch, with its franchise, within the protection of the charter contract, because said branch was constructed under a charter to another company which had no exemption from general tax-

ation, and the consolidation thereof with the appellee did not bring the same within the exemption of the appellee's charter. (Assignments 15, 16).

11. The contract for partial exemption from taxation was limited to thirty-six years from the completion of any road of appellee, and said period has long since expired, and said contract is no longer of any force. (Assignment 17).

12. The decree was erroneous in not refusing an injunction, and in not permitting the Comptroller to collect taxes according to the above contentions. (Assignment 18).

IV. BRIEF OF ARGUMENT.

1. The case finally made by the amended petition and relied on and sustained by the court below, turned upon the *effect as an estoppel* of the judgment upon the taxes of 1874. The effect as an estoppel of the judgment of a State court is a *local and not a Federal question*:

> Yazoo and Miss. Val. R. R. Co. vs. Adams. 180 U. S. 26.
>
> Phenix Ins. Co. vs. Tennessee. 161 U. S. 174.
>
> Covington vs. First Nat. Bank. 198 U. S. 100.

Original jurisdiction over the question should not be upheld by the Federal courts by the *indirection*

of reserving the matter really relied on for an *amendment*. The court should have declined to entertain the amendment or should have dismissed the bill as amended for want of jurisdiction, the case being one between citizens of the same State, and controlled by a question of local law. The amendment related back to the filing of the petition.

2. The allegations of Paragraph 24 of the petition that railroad property was unfairly valued by the Comptroller should be expunged as scandalous and impertinent. The laws of Georgia provide fully for fair arbitration of any differences between the Comptroller and the tax payers as to valuation of property. In this case, the valuations are those fixed by the taxpayer in its own return.

3. In a contest over the taxes of the appellee for the years 1875, 1876, and 1877, the Supreme Court of Georgia at the February term, 1879, rendered an opinion in which it was indicated that the property of appellee was protected by its charter contract from taxation beyond one-half of one per cent. of the net income from its investments, to a value of $4,156,000; but all values beyond that were taxable as other property in the State. The Comptroller was following this decision when enjoined in this case. Though between the same parties or their privies, this ruling was not strictly *res judicata*, because it involved other taxes than those now in dispute, and was not a final judgment. It is, nevertheless, the *last deliberate opinion of the State court*

of last resort upon the application of the tax laws of the State to the charter contract of the appellee, and while not binding upon this court will be given great consideration:

James R. Jetton et. al. vs University of the South, April, 1908. 208. U.S. 119

If not matter for a special plea cutting off further investigation, the stipulation attached to the record of this case shows that it was in evidence and passed upon generally in the case. (Record P. 57).

4. The judgments in the litigation over the taxes of 1874 between the then Comptroller and the appellee were sustained as *res judicata* estopping the issues raised in this case.

Conceding that the State of Georgia was in substance and effect a party to that litigation, and that William A. Wright, justifying his acts under the authority of the State, and the counties of Wilkes and Taliaferro, are in such privity as to be bound to the same extent the State is; still there is neither *res judicata* in the strict sense foreclosing all questions that *might have been litigated,* nor yet *estoppel by judgment* of issues *actually litigated and decided.*

The judgment of a *Federal court* upon the existence and extent of a tax exemption is an estoppel in future litigation:

Gunter vs. Atlantic Coast Line Co., 200 U. S. 273.

But what effect an adjudication of a State court has on future litigation, is not even a federal question. When the litigant proposes, as here, to stand *not* on his rights under the *charter contract and the Federal Constitution*, but chooses instead to stand on his rights under a *former judgment of a State court*, his rights depend upon the laws of that State alone. This court could not review the decision of the State courts upon them:

> Yazoo and Miss. Val. R. R. Co. vs. Adams, 180 U. S. 26.
>
> Phenix Ins. Co. vs. Tennessee, 161 U. S. 174.

Since manifestly the effect as an estoppel of the judgment of a State court ought to be no greater when pleaded in one court than in another, the Federal courts, when exercising original jurisdiction, will give the former judgment in the State court *the same effect, and no more, that it would be given in the State courts.* If the rule is in the State courts that tax matters are not within the scope of *res judicata*, and that a judgment in a contest over taxes for one year is no estoppel in litigation over taxes of another year, the rule will be observed by the Federal courts:

"A judgment of a State court sustaining the exemption claimed by a bank under its charter from municipal taxation on its capital stock which, under the local laws of the State is only res judicata in

respect of the identical taxes litigated in the suit, can be afforded no greater efficacy in the Federal courts."

> Union and Planters Bank vs. Memphis, 189 U. S. 71.

"An adjudication of a State court that a bank has a contract exemption from taxation on its capital stock is not *res judicata* in the Federal Courts as to taxes for years other than the one directly involved in the judgment, when by the settled law of the State an adjudication in respect of taxes from one year cannot be pleaded as an estoppel in suits involving taxes of other years."

> Covington vs. First Natl. Bank, 198 U. S. 100.

What effect would the Georgia courts have given the judgment?

The judgment upon the taxes of appellee for 1874 was formally pleaded as *res judicata* in the contests over those of 1875, 1876, and 1877. (Record p. 54). The Supreme Court disregards the plea, and treats the former judgment not as an *estopped*, but as *authority only*, which is modified and explained away.

> Goldsmith vs. Ga. R. R. 62 Ga. 490. (Record p. 61).

In a recent case between the same parties the appellee invoked in its own behalf, and obtained, a

direct decision of the point: The Supreme Court of Georgia, among other cases, cited *Newport vs. Commonwealth, 106 Ky., 444, 51 S. W. 433,* upon which the case of *Covington vs. Bank supra* was decided, and declares the Kentucky rule to be the law of Georgia:

> Georgia Railroad and Banking Company vs. Wright, 124 Ga. 596.

5. But if the general rules of estoppel as applied to tax matters by Federal Courts be regarded, the issues here raised are not foreclosed, because *not actually and necessarily decided* in the other judgment.

"A judgment is not a technical estoppel as to any matter if the matter is not such that it had of necessity to be determined by the court or jury before the court could give the judgment."

> Hunter vs. Davis, 19 Ga. 413.

"Where a judgment is pleaded as an estoppel, the burden is on the party relying on the estoppel to sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the former litigation."

> Draper vs. Medlock, 122 Ga. 234.
>
> See Memphis City Bank vs. Tennessee, 161 U. S., 186 (4).

In New Orleans vs. Citizens Bank, 167 U. S. 371, upon which the ruling of the Circuit Court was based, the principle is succinctly but completely stated thus:

"The estoppel of a judgment does not depend upon the question whether or not there is the same demand in both cases, but exists although there be different demands, when the question upon which the recovery of the second demand depends has, *under identical circumstances and conditions*, been previously concluded by a judgment between the parties or their privies."

And on page 398, "It follows then that the mere fact that the demand in this case is for a tax of one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if in the prior cases the question of exemption was necessarily presented and determined *upon identically the same facts* upon which the right of exemption is now claimed."

Pursuing further the rulings of that case: On page 381 it appears that the bank's exemption read thus: "The capital of said bank shall be exempt, etc., ... during the continuance of its charter." "All the profits made by said corporation shall be added to and made a part of the capital" except a small proportion stated. The State courts held in a series of decisions that the profits were part of the exempt capital, and that the bank could not be

made to pay a tax assessed on the shareholders for their shares. That tax matters were within the principles of estoppel by judgment in Louisiana was declared by its Supreme Court. Then taxes were claimed on certain property of the bank bought by it on foreclosure of mortgages given to secure stock subscriptions, the shareholders themselves were assessed on their shares, and a license tax was imposed. The litigation then arising went into the Federal courts, and this court held:

"A judgment establishing the exemption from taxation of the capital of a bank, its banking house and fixtures, and from liability to pay a tax on its shareholders, is not *res judicata* as to the exemption of the shareholders themselves, or of the real property acquired by the bank on the foreclosure of mortgages securing stock subscriptions, nor as to the exemption of the bank from a license tax."

On pages 401, 402, the contention is dealt with, that the prior holding was that the bank under its contract could not be taxed at all, and the contention is declared to be untenable. It was held that the stockholders were liable to be taxed, that the real estate was not a part of the exempt capital, and that the license tax question was not then for decision.

The issues actually and necessarily determined by the decision of the Georgia Supreme Court in the litigation over the taxes of 1874 were those alone that were (1) made by the pleadings, and (2)

brought by special assignment of error before the Supreme Court. The illegality alleged (1) a contract of exemption in the charter. (2) That the property then taxed was that in which the stock had been invested. (3) That the Act of 1874 could not repeal the charter. The judgment of the lower court was that the illegality be sustained as to all the tax "except the tax on 440 shares of new stock valued at $93.00 per share, being the sum of $204.50, and that the fi. fa. proceed to collect said last named sum" and costs. (Record, p. 72, 74).

The bill of exceptions of the State claimed error in the lower court "in holding that said exemption in said charter was not repealed by the tax act of 1874; and that as applied to this case the tax act of 1874 violated the obligation of the contract between the State and said defendant; in holding that said exemption was still of force, and constituted a contract which the State could not repeal, and in restricting the fi. fa. as he did by said judgment. (Record, p. 69). The corporation assigned error in that the court did not apply the Federal Constitution "not only so as to protect old stock of said company (which the court did hold) but new stock also." (Record, p. 69). Nowhere in the record does it appear to have been questioned but that the property exactly represented the various stock issues of the company. These assignments of error authorized the Supreme Court to pass on the questions. (1) Whether the corporation had a then existing charter contract with the State. (2) Whether the

Act of 1874 repealed it. (3) Whether the new stock was protected by it. *No question is made in the case at bar by either party as to any one of these issues.* There was in the former case *no issue* as to the *taxability of a franchise.* There was neither issue in the pleadings nor in the evidence as to whether there *was a surplus of property* over capital stock; and if so, whether it was taxable or exempt. No issue as to the *separate status of the Washington Branch,* or even as to whether the "stock" exempted was the *shares* or the *capital* in the company's hands. The latter was assumed, What was said by the Supreme Court in the fourth division of the opinion as to the nature of investments that would be taxable is *obiter dictum,* unfounded in any issue either in the pleadings or evidence, or in any assignment of error. The court was without jurisdiction to say it:

Morris vs. Glover, 121 Ga., 752, 757.

As in the case of the *Citizens Bank supra,* if we have an adjudication settling the question of an irrepealable exemption of the "stock of the company," the adjudication does not extend to what sort of property is to be reckoned as included in the exempt capital; to what amount; whether an excess be taxable; or whether the franchise is a part of the exempt "stock."

6. The judgment that the last issue of 440 shares of stock was taxable at a then value of $93.00 per

share, involves a determination that the *property behind the shares of stock* is to be looked to. When, as now, the property makes the shares represent $118,000, that value is taxable on account of these shares. If property represented by these shares is not to be counted exempt, for lack of a contract exempting, it follows that *property arising* from sale of bonds, reinvestments of profits, and *in any way except* the original capital stock, has been adjudicated to be taxable.

7. Laying aside the entanglements of former judgments, it is freely conceded that the charter of the appellee was a contract between the State and the corporators, the impairment of the obligation of which by the passage of any law by the State is prohibited. It is conceded that even as to the necessary and sovereign right of taxation, the stipulation for partial exemption was binding. If the property sought to be taxed is within the exemption it is conceded that the Act of 1874, the Constitution of 1877, and the Act of 1902 are laws violative of the contract when applied to this property. The entire question is one of the proper *construction of the contract.*

The rule of construction is *strictness* in favor of the right to tax. No exemption will arise from *implication.* If there be *doubt or ambiguity* in the language, the doubt will be invariably resolved in favor of the State. Whether the question be as to the existence of *any* exemption, or as to the *extent* of

an admitted exemption the rule is the same. In the rule of strictness the Supreme Court of Georgia and this court agree:

"Statutes enacted in favor of corporations or particular persons, and in derogation of common right are to be *strictly construed:*"

Young vs. McKenzie (1847) 3 Ga. 31.

"Grants of exclusive privileges to corporations or individuals are to be strictly construed; and if the terms of the contract between the individual or the corporation and the State are *ambiguous*, the ambiguity must operate in favor of the public."

McLeod vs. Burroughs, 9 Ga. 214.

"Grants by the public are to be strictly construed, and nothing passes by *implication.*"

Shorter vs. Smith, 9 Ga. 517.

"Statutes under which exemption from taxation is claimed by corporations will be strictly construed, and the exemption will be held not to be conferred unless the terms under which it is granted *clearly and distinctly* show that such was the intention of *the Legislature:*"

Mayor of Macon vs. Central R. R., 50 Ga. 620.

"The exemption must appear by such clear and unmistakable language that it *can not be reasonably*

construed consistently with reservation of power by the State," said in construing this same charter:

> Georgia Railroad and Bkg. Co. vs. Smith, 128 U. S. 174 (6).

"The surrender of the power to tax will never be presumed, but must be shown by *clear and unambiguous language* which will admit of *no other reasonable construction.*" This said of a Georgia charter:

> Southwestern R. R. vs. Wright, 116 U. S. 231.

"The existence of a well-founded *doubt* is equivalent to a *denial* of the claim to an exemption from taxation":

> Phenix and Marine Ins. Co. vs. Tennessee, 161 U. S. 174.

So where the question was as to the *extent* of an admitted exemption: "Exemptions from taxation art to be strictly construed, and no claim of exemption can be sustained unless within the *express letter* or the *necessary scope* of the exempting clause": Here the exemption was of the "capital stock, property and effects" of the corporation. It was restricted by this court to such property and effects as were necessary to the business of the corporation:

> Ford vs. Delta Pine Land Co., 164 U. S. 662.

"Taxation being the sole means by which sover-

eignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on *any portion* of his property must, on that account, be clearly defined, and founded on plain language. There must be no *doubt or ambiguity* in the language used upon which the claim to exemption is founded. It has been said that a well-founded *doubt is fatal* to the claim": It was ruled that the exemption of the "stock" of a bank did not include its surplus:

> Bank of Commerce vs. Tennessee, 161 U. S. 134, 146.

"Exemptions from taxation are not favored by the law, and will not be sustained unless such *clearly appears* to have been the intention of the *Legislature*. . . . . and while as we have held in many cases, Legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and *every reasonable doubt* be resolved in favor of the taxing power."

> Yazoo and Miss. V. R. R. vs. Adams, 180 U. S 1, 22.

"The stock of said company and its branches . . . . . shall be subject to a tax not exceeding one-half per centum per annum on the net proceeds of their investments."

In form, the contract is one *for taxation*, rather

than *exemption*. The description of the tax as "*not exceeding*" one-half per centum fairly amounts to a *covenant* that the particular tax contracted for shall not be larger than the limit mentioned.

The contention of the petition, Par. 11, that there was a contract "never to impose a direct tax *on property*, but to receive *in lieu of all taxes* and burdens on said property one-half per cent. of the net earnings" is utterly without support. Nothing was said about any other taxes and burdens, and that there should be none is a mere *supposition, an implication*, and exemptions do not arise by implication. In the case of the Brunswick Canal and Railway Co. (see Brief page 92) this same Legislature did agree to accept a stipulated tax in lieu of all others, by express language, but it was a much more onerous tax.

The stipulated tax here was to be *measured* by the income of the investments. The *thing taxed*, however, and *exempted* from taxation beyond the limit named, was the "*stock of said company and its branches*," and not the investments.

The thing exempted beyond the limit is the thing taxed within the limit: *The stock*. The "*company*" is the Georgia Railroad Company, the parent corporation. The "*branches*" are the "*branch companies*" incorporated by anticipation in the 24th section of the charter, but which by reason of the changes made by the Act of 1835 were never organ-

ized. The two are co-ordinate in the sentence under discussion: "The stock of the company and the stock of its branches."

Since the branches were never organized as separate corporations, the "stock of the company" alone need be considered. The word *"stock"* may have one of three meanings: (1) The *property or capital* devoted to a particular business, as a merchants "stock in trade." (2) The *shares or certificates of stock* issued by a corporation to its stockholders. (3) The *value contributed* to a corporation *by the corporators* within the limits fixed by the charter, its *"capital stock."* The appellee contends for the first meaning. The appellant contends for one of the other meanings.

(a) The first meaning is a mercantile term, or at best used in a general sense in works on economics only. In a charter of incorporation we would expect to find the word used in a sense *appropriate to corporate enterprise*, the distinguishing feature of which is the creation of a *"capital stock"* owned in *shares* by *"stockholders"* in proportion to the *"stock"* they have respectively taken. The "stock" of a merchant may mean his goods, but the "stock" of a chartered corporation means either its capital or its shares.

(b) As *used in this charter* the word nowhere has any save the second and third meanings. In no instance has it the first meaning. The exact phrase

"*stock of the company*" occurs several times: Section 3 of Act 1833 defines it thus: "The stock of the company *shall consist* of fifteen thousand shares of $100.00 each share, and the said company shall be formed on that capital." Section 7, the votes are "equal to the number of shares he may hold in the *stock of said company.*" Act 1835, Section 2, "The stock of said company *shall consist* of two millions of dollars . . . . . in shares of one hundred dollars each." Act of 1849, "provided the amount of the *increased stock of said company* shall not be exempted from taxation." The stock of the company is evidently not its wealth, its property, whatever that may happen to be, but that value from time to time *fixed by the Legislature* as its *capital stock.*

The single term "stock" occurs much more frequently, but always as meaning the shares or the value contributed to the corporation for them. (See the italicized words in the extracts from charter, Brief p. 44 et seq.

In the Act of 1847, the company was authorized to issue "*stock*" for the excess of the *cost of the road over* the present capital, recognizing that the property was then distinct from, and *in excess* of the stock of the company.

In the Act of October 12, 1870, the company was authorized to "increase the capital stock" so as to rebuild its *destroyed property*, again sharply distinguishing the stock from the property.

(c) The *Legislature appreciated the difference between exempting stock, and property.* The original charter of the *Central R. R. and Canal Co.* was granted the same day but one as that of the Georgia Railroad. Its exemption was of the "canal or railway and the appurtenances of the same." This company's name was changed and banking powers granted it at the same time similar changes were made in the Georgia Railroad Company. The exemption then made was: "*The said railroad and its appurtenances* shall not be subjected to be taxed higher, etc., and no municipal or other corporation shall have power to tax *the stock of said company,* but may tax *property,* real or personal of said company, etc., ..." This court has declared that a clear distinction was to be taken between the "stock of the company" and the property of the company."

> Central R. R. and Bkg. Co. vs. Wright, 164 U. S. 327.

(d) The *analogy of corporate taxation at the time* would suggest that the capital stock, and not the property was considered. In 1833, besides the chartered banks, there seems to have been no business corporations in Georgia except the Steamboat Company of Georgia. It was taxed not upon its property, but its *capital stock paid in: Prince Dig. p. 861.* The chartered banks were taxed not on their property, but on their *capital stock paid in*: (See supra

Brief p. 52.) This analogy is adverted to in the first decision by the Supreme Court of Georgia upon this charter:

"The words seem to require this meaning. 'The stock shall be subject to a tax.' So certainly do several obvious considerations of convenience. And stock, as stock, is that on which the State tax is always laid, I believe; so there is analogy too."

City Council of Augusta vs. Ga. R. R. and Bkg. Co. 26 Ga. 663.

(e) *On authority* the question is more vexed. Taking the Georgia cases, in *City Council vs. Ga. R. R. and Bkg. Co.*, supra, it is held: "We think that this part of the charter means, secondly, that the stock of the company *as stock*, as a unit, is alone what is to be subject to the tax; not parts of the stock, as the part used in banking, nor the particulars in which the stock consists, as the land, cars, rails, etc."

The definition of stock made by Judge Warner in Ordinary vs. Cent. R. R., 40 Ga. 646, and cited by the Circuit Court, was not concurred in by other members of the bench, and not followed by this court on writ of error: Cent. R. R. vs. Wright, supra.

If the case of Georgia vs. Ga. R. R. and Bkg. Co., 54 Ga. 423, is not available as an estoppel, it is destroyed as an authority by the case of

Goldsmith, Comptroller, vs. Ga. R. R. and Bkg. Co., 62 Ga. 485.

The shares in the hands of the shareholder, and the capital stock in the hands of the corporation are separate and distinct properties, and the taxation or exemption of one is not the taxation or exemption of the other:

Van Allen vs. Assessors, 3 Wall. 573.

Farrington vs. Tennessee, 95 U. S. 679.

County of Shelby vs. Union and Planters Bank, 161 U. S. 149.

Owensboro Bank vs. Owensboro, 173 U. S. 664.

If the contract therefore relates to the shares, the State is free to tax the corporation and its property.

8. If the "stock of the company" is the *capital stock* in the hands of the corporation, since that value, originally in money, is soon converted into property, by an equitable impressment of the property with the attributes of the capital, the property of the corporation has often been said to "represent the capital stock." In the matter of taxation, this is on the assumption that the *property equals in value the stock*. Should the business be successful, and show an excess of property values over the stock invested, the excess is *surplus*, and not *stock*, and is not entitled to the immunities attaching *to stock*.

"The capital stock of a corporation . . . is the amount fixed upon . . . . as their stake in

the concern . . . . Additions on the other hand may be made to the original stock by a successful prosecution of the business; still these *profits* do not constitute *capital.*"

Hightower vs. Thornton, 8 Ga. 500.

"The capital stock is the money paid, or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it is invested in. If a large *surplus* be accumulated and laid by, that *does not become a part of it.*"

Farrington vs. Tennessee, 95 U. S. at p. 683.

"The exemption from taxation of *stock of a bank* upon payment of an annual tax of one-half of one per cent. upon each share, which shall be in lieu of all other taxes, does not grant exemption to the *surplus* belonging to the bank as the *surplus is distinct property from the capital stock*":

Bank of Commerce vs. Tennessee, 161 U. S. 134.

The exemption of the capital stock of this corporation does not exempt the surplus value of its property:

Goldsmith vs. Ga. R. R. and Bkg. Co., 62 Ga. 485.

In none of the cases holding that an exemption of

the capital stock was an exemption of the corporate property *was there a surplus involved.*

The fair construction of the contract between State and corporators is that the State agreed that if the corporators would put their money into a railroad, the State would limit its right to tax on "at much taxable value. The amount thus to be withdrawn from general taxation was practically unlimited under the Act of 1833. *The Act of 1835 limited* it to $2,000,000. In every subsequent increase the Legislature *emphasizes* the limitation of the amount authorized by the words "*not exceeding.*" If these words carry a covenant not to make the *tax* larger than the amount named, they likewise carry a covenant that the corporation will not make this *exempt* "*stock*" thus authorized more than the limit to which the Legislature has consented. Section 8 (4) of the Act of 1835 provided for *dividends* of the profits, and originally the Legislature never contemplated the accumulation of a surplus. (Brief, p. 47).

It would be not a strict, but a most liberal construction of the contract to make the "*stock of the company*" include also its *surplus;* when the "stock of the company" was declared to consist of $2,000,000 and later covenanted "not to exceed $4,000,000" to make it cover $11,000,000. There is no "clear and unambiguous language" on which to found such a construction. There is at least room for "reasonable doubt" as to whether "stock" does not mean "*stock*" instead of *stock and surplus.*

If it be said that the *surplus investment is necessary* to run a modern railroad, it may be replied that the encouragement of an *exemption from taxation is not necessary* to a modern railroad. If appellee will exceed its contract in the matter of its corporate investment, let it bear its just burden as to the excess.

9. The *taxable franchises* of the appellee are not a part of the "stock of the company." If the stock be considered to be the shares of stock, none of the property of the corporation is exempted, and hence the franchises are not. If the stock be the capital stock, and mean the value contributed by the corporators, the franchises are not included, for they were no part of capital stock to be subscribed and paid in by the corporators, no part of $1,500,000, or the $2,000,000, in which the "stock of the company" was declared to "consist." The franchises were distinct properties *contributed by the State herself*.

Had the contract undertaken to limit taxation of the "*property*" of the company, while a proper construction of that term would limit it to such property as was appropriate to the corporate purposes, still the franchises would be included because inseparable from the corporate purposes:

"It is true that it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term

"property of the company," and therefore equally within the protection of the charter."

Wilmington R. R. vs Reid, 80 U. S. 264.

Gulf and Ship Island R. R. vs Hewes, 183 U. S. on p. 77.

But the term "*stock*" is a different term, and if held to cover "property" at all, it is only by the *equitable impressment* of the attributes of the *money which the corporators contributed* as the original stock, and can not be extended beyond the values and the properties so contributed so as to include these unchangeable intangible properties *contributed by the State*, as to the taxation of which *no stipulation was made or intended.*

Compare St. Louis & I. Mt. R. R. vs Loftin, 98 U. S. 559.

The fact that a franchise had never been taxed when the stipulations were made may explain *why* no agreement was made respecting it, but does not operate to hinder bringing within the power of taxation the new subject matter:

It is not a case of singling out the franchises granted these corporators for special taxation, and so putting an additional burden specifically upon their business, and thus indirectly making them purchase again their privileges under the charter; but it is simply the general exercise of the right to tax

operating uniformly upon all property within the State of this character. The difference is well pointed out in

Murray vs Charleston, 96 U. S. 432.

10. The stock or the property represented in the *Washington Branch* is not within the charter contract. The original exempted stock was $1,500,000. In 1835 it was made $2,000,000. In 1837 the extension of the road from Madison to the State Road was authorized, with all the "*powers and privileges, rights and immunities*" of the original road, and in 1847 permission was given to increase the capital stock to an amount "not exceeding $4,000,000" to cover this excess of cost over stock previously authorized. Nothing was said as to the exemption of this increase of stock. Perhaps it may be fairly regarded as exempt under the sweeping language of the act of 1837 which authorized the railroad, and under which the investment was made. By the Act of 1849, a power to construct the Washington Branch was revived, and another increase of stock to "not exceeding $5,000,000" was authorized, but the increase was *expressly declared to be subject to such taxation* as the legislature might impose. By the Act of February 5, 1850, the Washington Rail or Plank Road Company was chartered to build the Washington Branch, "and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding $200,000, and shall be authorized to exercise *all the powers and privileges* conferred by the Act of the General Assembly passed

in the year 1833 to incorporate the Georgia Railroad Company." In 1852 the Washington Plank or Rail Road Company, and the Georgia Railroad and Banking Company were authorized to "*consolidate their stocks*" under the latter's name, and it was provided that "said corporate body shall be authorized to exercise *all the powers and privileges* conferred by existing laws on the Georgia Railroad and Banking Company." (Brief pp. 47.) It appears that the latter's stock was thereupon increased to $4,156,000, at which it remained till 1868.

If the increase of $156,000 was under the Act of 1849 it was *expressly made subject to taxation.* This act clearly declares the legislative purpose to grant *no further exemption.*

If under the Act of 1852, we have apparently the case of one railroad company absorbing another, retaining its own identity, and taking over the property of the other, and issuing its own stock in payment:

Central R. R. vs Georgia, 92 U. S. 665.

Where two railroads are thus consolidated, the *presumption* is that each railroad will be held with the exemptions and burdens originally attached thereto, unless the contrary be expressed:

Tomlinson vs Branch, 82 U. S. 460.

Minot vs Phil. R. R. Co., 85 U. S. 206.

Phil. and Wil. R. R. vs Maryland, 10 How. 376.

Immunity from taxation is not granted by a grant of "*all the rights and privileges*" of a company which has such an immunity; especially when in other dealings with the subject the legislature has spoken of the "rights, privileges and immunities" of that company. The omission of the word "immunities," so appropriate to the exemption from taxation, raises a doubt as to whether the word "privileges" ought not to be restricted to the special franchises of the charter:

Phenix Ins. Co. vs Tennessee, 161 U. S. 174.

In Sec. 24 of the Act of 1833, the Branch Companies are twice invested with the "*rights, privileges and immunities*" of the Georgia Railroad Company. (Brief p. 42.) The Act of 1836 incorporating the *Middle Branch R. R. Co.* to build from Madison to the Chattahoochee River, conferred on it "*all the rights, immunities and privileges*" of the Georgia Railroad and Banking Company. (Brief p. 45.) The Act of 1837 authorizing the Georgia Railroad and Banking Company to build this same line declared that there should attach "*all the powers and privileges, rights and immunities*" of the original road. (Brief p. 46.) The Act of 1847 expressly declared the legislative purpose *not to exempt* the Washington Branch. (Brief p. 48.) The Washington Plank or Rail Road Company, by the Act of 1850 was not given the "immunities," but only the "*rights and privileges*" of the old Georgia Railroad Company. This under the circumstances clearly did

not cover the exemption from taxation. And they were granted "*for this purpose*" namely, "*to build, construct and keep up a plank* or rail road from Wahington in Wilkes county to some point of the railroad on the Georgia Railroad and Banking Company." Many of the rights and privileges conferred on the Georgia Railroad Company were necessary for that purpose, such as the exercise of the right of eminent domain, but an exemption from taxation was not necessary, and did not pass:

Annapolis & Elk Ridge R. R. vs Commissioners, 13 Otto 1.

Knoxville & Charleston R. R. vs Gaines, 7 Otto, 697.

And the statute giving the consolidated corporation the "*rights and privileges*" of the Georgia Rail road and Banking Company did not confer the immunity from taxation:

Chesapeake and Ohio R. R. vs Miller, 114 U. S. 176.

The Franchise of the Washington Branch is of course taxable, if there is no exemption of its stock or property.

11. The *time the exemption is to last* is a matter of strict construction also. Sections 2 and 15 both allude to 36 years from the completion of the first road as a time limit for some of the special privi-

leges of the charter. (Brief p. 23-24.) This limit was out about 1879 In construing the 12th Sec. of this charter, which contains in itself no reference to this limitation of 36 years, this court declared that the limitation applied to the privileges given in that section:

> Georgia R. R. and Banking Co. vs Smith, 128 U. S. 174.

It equally may apply to the special immunity from taxation granted in the 15th section, in which the time limit is mentioned.

12. Stress is laid in the opinion of the Circuit Court upon the fact that property sought to be taxed *has not hitherto been taxed*. The long continued practice of the parties to a contract may often be looked to to aid in its construction, provided the practice be totally inconsistent with the rights now claimed, and provided the person whose acts constitute the practice was authorized to alter or waive the rights of the party.

Prior to 1874 there was no means provided by law for taxing railroad property. The collection prior to that time of the income tax alone exhausted the powers of the tax officers. This was true of all railroads in Georgia.

Efforts to tax the property were then vigorously prosecuted, and checked by the courts. If the decisions were erroneous, the right to tax was not de-

stroyed by them, though the fact of the decisions is sufficient to explain subsequent official inaction.

The decisions declared that a surplus of property over stock was taxable generally. *But no surplus then existed.* The Act of 1870 (Brief p. 59) shows that the property was largely destroyed, and the decision upon the taxes of 1874 declares the stock to be worth then only $93.00 per share, showing there was a deficiency of property values as compared with stock. It does not appear that the tax officers ever became aware of the existence of a surplus till it was disclosed by the second return of the company made in 1903. Prompt effort to tax followed.

No machinery to tax franchises was ever provided till 1902, so that inaction in that direction is meaningless.

At no time have the tax officers of the State been authorized, either by their action or inaction, to extend exemption to property in the State that was really not exempt. Since the Constitution of 1877, the Legislature itself is powerless so to do. (Brief p. 63.)

The Mayor and Aldermen of Savannah had power to exempt property from taxation in making a lease of it and for a hundred years did not tax it, and repeatedly referred to it as not taxable under the contracts of lease made; but such a course of dealing

did not make it exempt where there were not plain words in the lease creating the exemption:

Wells vs Savannah, 181 U. S. 531.

This language is approvingly quoted from the Supreme Court of Georgia, Wells vs Savannah, 107 Ga., 1: "Mere non-user by a government of its power to levy a tax, it matters not for how long continued, can never be construed into a forfeiture of the power. . . . Whatever the expectations of purchasers, or the unbroken practice of the City hitherto, may have been, the mandate of the Constitution of 1877 is to tax all property, save that expressly exempted by the legislature under Constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

The decree should be reversed, and remodeled in accordance with the contentions of the appellant.

III.—QUOTATION OF STATE STATUTES.

For convenience of reference, the portions of Appellees charter, and other public laws to which special reference will be made, are here quoted:

Act of December 21, 1833, incorporating Georgia Railroad Company. Prince Dig. 304. "Sec. 2. The company shall have the exclusive privilege of constructing railroads from any point in this State

within twenty miles of the road herein designated as the Union Road and its branches, leading to Eatonton, Athens and Madison, continuously to the city of Augusta, for and *during the term of thirty-six years.*"

"Sec. 3. The *stock of the company* authorized and incorporated by this act, *shall consist* of fifteen thousand shares, of $100 each share, and the said company to be formed on that capital; but the said company shall be at liberty to enlarge their capital, as in the progress of their undertaking they may find necessary; and that either by additional assessments on the original shares, not to exceed in the whole the sum of twenty dollars in addition to each original share, or by opening their books for enlarging their capital by new subscriptions in shares of not more than $100, so as to make their capital adequate to the works they may undertake, and also to prescribe the terms and conditions of the new subscriptions. And it shall be lawful for the company, from time to time, to invest so much, or such parts of their capital, or of their profits, as may not be required for immediate use, and until it may be so required, in public *stock* of the United States, or of this State, or of any incorporated bank, etc."

"Sec. 7. In the said election for president and directors, the vote shall be taken by the following rule: Each subscriber shall be entitled to a number of votes equal to the number of shares he may hold in *the stock of said company,*" etc.

"Sec. 15. The exclusive right to make, keep up and use the railroads and transportations authorized by this act shall be for and during the term *of thirty-six years*, to be computed from the time when the said road from Augusta to either of the points hereinbefore designated shall be completed for transportation. Provided, that the subscription of *stock* or shares *of said company* to the amount of at least five thousand shares, as aforesaid, be filled up within six months of the passing of this Act, and the work from or between Augusta and either of the places hereinbefore first mentioned, be commenced within two years, and be completed within six years after the five thousand shares shall be subscribed. And after said *term of thirty-six years* shall have elapsed, though the Legislature may authorize the construction of other railroads for the trade and intercourse contemplated herein; nevertheless, the Georgia Railroad Company shall remain and be incorporated and vested with all the *estate, powers and privileges* as to their own works herein granted and secured, except the exclusive right to make, keep up, and use railroads over and through such parts of the country, that shall so have expired by the foregoing limitation; but the Legislature may renew and extend that exclusive right upon such terms as may be prescribed by law, and be accepted by the said incorporated company; *the stock of said company* and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said railroads, or any one of them; and after that *shall be subject to a tax not exceeding*

one-half per cent. per annum on the net proceeds of their investments."

"Sec. 24. Whensoever a number of stockholders in interest amounting to three thousand shares, shall unite for the furtherance, construction and completion of either of said branches of said road, they shall have the power to terminate said union road. . . . . That said stockholders, so electing and determining as aforesaid shall and may then and there be and exist as a *separate body corporate*, and shall then and there and thenceforward have, use and exercise all the *rights, privileges, immunities and enjoyments* hereby given, granted and secured to said union company. . . . . That their powers as a corporate body, shall be similar, *and their rights, privileges and immunities*, in regard to said road so diverging shall be the same, and subject to the same restrictions, as herein and hereby provided, imposed, and granted to, upon and for said union company. They shall not be called on by said union company, from and after the date of their said election, and determining said point of diverging, for any other or further payment *on stock*, but may proceed as a *distinct company* to construct a branch of said road to and through the respective points: Eatonton, Grrensboro and Madison, or Athens, respectively, according to circumstances as they may choose . . . and said stockholders so electing and determining as aforesaid shall be known, according to the branch to which they shall respectively attach themselves, by

the corporate name and style of the Eatonton Railroad, the Greensboro and Madison Railroad, or the Athens Railroad. And *said branch companies* so named, shall and may apply the residue of their *stock*, unpaid and unapplied at the time of diverging, to the sole and separate use and construction of the branch to which each may be attached, etc."

Act approved December 18, 1835, incorporating the Georgia Railroad and Banking Company. Prince Dig. 311. "Sec. 1. That the stockholders of the Georgia Railroad Company, and such other persons as shall take *stock* under this act, and their successors and assigns shall hereafter be a body corporate under name and style of the Georgia Railroad and Banking Company, etc."

"Sec. 2. The *stock of said company shall consist* of two millions of dollars, one-fourth of which, applied to banking purposes, shall be gold or silver coin, in shares of one hundred dollars each; of which capital one-half may be used for banking purposes, and not more, till the completion of the road to Athens, and one of the southern branches through Greensboro, to be designated by a vote of the stockholders; at which time any *capital stock unemployed may* be used for banking purposes . . . ."

"Sec. 8 (4) *Dividends* of the *net profits* of the *stock* used in banking purposes, or so much thereof as may be prudent, shall be declared and paid half yearly, if the condition of the company warrant it, until the road shall yield a profit, when and in which

case that profit may also be in like manner divided; and such didivend shall be from time to time determined by a majority of the directors, at a meeting to be held for that purpose, and shall in no case exceed the amount of the net profits, actually acquired by the corporation, so that the *capital stock* thereof *shall never be impaired.*"

"Sec. 17. No foreigner shall either directly or indirectly own *stock* in the said railroad or bank, and if any foreigner shall own *stock* in any wise, *the same* shall be forfeited to the State."

"Sec. 13. That the Act to which this is an amendment shall be and remain in full force and effect in every section and clause thereof, except where it conflicts with the provisions of this Act."

Act approved December 25, 1837, Acts 1837, p. 212.

"Sec. 1. The Georgia Railroad and Banking Company shall have the right, and they are hereby authorized and empowered, to continue their railroad from the town of Madison in Morgan county to pass through or near Covington, in the county of Newton, to connect with and join the railroad about to be constructed by the State from the Tennessee line near the Tennessee River, to the southeast bank of the Chattahoochee River, as contemplated by the Act recited in the preamble, and for that purpose the said Georgia Railroad and Banking Company shall have *all the powers and privileges, rights and immunities* in the construction of said branch from Madison as aforesaid to the said State Road as are

contained in the several acts heretofore passed and now of force constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Railroad; and the said acts shall extend to and regulate the construction of said extended road hereby authorized to be constructed in the same manner and to the same extent and for the same purposes and causes as the same have been used and applied to the Georgia Railroad and its branch from the City of Augusta to said town of Madison." (No increase of stock was provided for).

Act approved December 9, 1843, Acts 1843 p. amending the act incorporating the Georgia Railroad and Banking Company: "Sec. 1. Said company shall be authorized to purchase and receive their *own stock*, or real and personal estate in payment of debts due said company, provided always that the capital of said company shall not, by the purchase of their *own stock*, be reduced below two millions of dollars."

"Sec. 2. Said company shall have power to purchase and hold any tract or tracts of land through which their road runs, or may hereafter run."

Act approved December 25, 1847, Acts 1847, p 192. "Sec. 8. The Georgia Railroad and Banking Company shall have and is hereby invested with full power to increase their capital to an amount *not exceeding four millions of dollars*, either by assessments on the existing shares, by obtaining new sub

scription or by *issuing stock* for the *excess of the cost* of their road over the present capital, or by all of these means; and that such assessments, subscriptions, or issues shall be made at such times, and on such terms, limitations, restrictions and conditions as the stockholders in convention may deem expedient and proper; provided, that this act shall not authorize an increase of banking capital."

Act approved December 20, 1849, Acts 1849, p. 239. "Sec. 1. The Georgia Railroad and Banking Company shall be allowed to increase their capital to a sum *not exceeding five millions of dollars*, upon such terms, limitations and conditions as the stockholders thereof in convention shall determine; provided always, that the banking capital of said company shall not be increased beyond the amount now authorized by their charter, namely one million of dollars."

"Sec. 3. The power heretofore granted to the Georgia Railroad and Banking Co. of constructing a branch of their road to Washington in the county of Wilkes, be and the same is hereby revived and authorized to be exercised by said company, provided that the amount of the *increased stock* of said company shall *not be exempted from taxation*, as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the Legislature may hereafter impose."

Act approved February 5, 1850, Acts 1849-50, pp. 219, 223. "Sec. 12. A. S. Wingfield, Thomas

Semmes (and others named) and their associates and assigns be and they are hereby authorized to build, construct and keep up a Plank or Rail Road from the town of Washington in Wilkes county, to some point of the Georgia Railroad and Banking Company's road, and *for that purpose* shall be authorized to create and receive by subscription a capital stock not exceeding two hundred thousand dollars, and shall be authorized to exercise all the *powers and privileges* conferred by the act of the General Assembly passed in the year 1833 to incorporate the Georgia Railroad Company, and under all the liabilities and restrictions therein contained."

Act approved January 21, 1852, Acts 1851-2, p. 120. "Sec. 1. That the Georgia Railroad and Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their *stocks*, the said Georgia Railroad and Banking Company issuing *stocks* in their said company to the stockholders of the Washington Rail or Plank Road Company on terms of equality with the general stockholders, in amount equal to the amount held by them respectively in *the stock* of the Washington Railroad or Plank Road Company, and the two companies aforesaid, after the consolidation of their *stocks*, shall be known as one body corporate under the name and style of the Georgia Railroad and Banking Company, and that said corporate body shall be authorized to exercise all *the powers and privileges* conferred by existing laws upon the Georgia Railroad and Banking Company, and be

under all the liabilities and restrictions imposed on the same."

Act approved Oct. 5, 1868, Acts 1868, p. 147. "Sec. 1. That the Georgia Railroad and Banking Company have the power to extend their road from or near the City of Athens to the town of Clayton in Rabun county, and for that purpose the said company shall have and enjoy all *the powers and privileges* of the original charter and amendments."

"Sec. 2. For the purposes stated in the above section, the said company may increase its capital in such form and upon such terms as the board of directors may determine; provided, said increase *shall not exceed two million dollars.*"

Act approved October 12, 1870, Act 1870, p. ___. "Sec. 1. That for the purpose of enabling the Georgia Railroad and Banking Company to rebuild their depots and machinery, renew their rolling stock, and replace their iron, all of which were destroyed or greatly damaged and depreciated by acts of war, the Georgia Railroad and Banking Company is hereby authorized and empowered to increase the *capital stock* of said company to a sum *not to exceed the sum of* five million dollars, and the said increase of capital, when made by said company, shall stand upon the same footing, have the same *privileges and exemptions*, and be subject to the same restrictions and responsibilities of the existing *capital stock* of said company; provided, the increased capital stock shall be paid for in cash at par value."

Bonds were authorized to be issued by the Company in Act approved October 22, 1870, Acts 1870, p. 325; Act of February 27, 1875, Acts 1875, p. 235; and Act of February 26, 1877, Acts 1877, p. 235.

The following are the charter contracts in the matter of taxation of the twin corporation, *Central Railroad and Banking Company:*

Act approved December 20, 1833, Prince Dig. 301.
"Sec. 7. The said canal or *railway, and the appurtenances of the same*, shall not be subject to be taxed higher than a half per cent. upon its annual net income."

Act approved December 14, 1835, Prince Dig. 332.
"Sec. 18. The said *railroad and the appurtenances of the same* shall not be subjected to be taxed higher than one-half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax *the stock of said company*, but may tax *any property*, real or personal of the said company, within the jurisdiction of said corporation in the ratio of taxation of like property."

The Act approved December 30, 1836, Prince Dig. 368, incorporated the *Middle Branch R. R. Co.*, to run from Madison to the Chattahoochee River.
"Sec. 5. Said company shall possess and enjoy all the *rights, immunities and privileges* which are had, possessed and enjoyed by the Georgia Railroad and Banking Company, and shall be subject to all the pains, penalties, liabilities, restrictions and limita-

tions which are incident to and binding upon the said Georgia Railroad Company, except as relates to Banking privileges . . . ."

Act approved December 20, 1334, Prince Dig. 318, incorporates *Brunswick Canal and Railway Co.* "Sec. 10. And the *stock of the aforesaid company* shall be exempt from all duties, taxes, and impositions whatever, unless it be such a tax and no more as is now imposed on *bank stock* in this State."

Statutes relating to taxation:

Act approved December 19, 1817, Prince Dig. 859. "Sec. 2. There shall be paid to the State a tax of thirty-one and a quarter cents on every hundred dollars value of *bank stock* operated upon or employed within the State, which tax shall be assessed and collected in the manner following, viz.: It shall be the duty of the president and directors of every bank incorporated by the Legislature of this State, to cause the cashier to transmit to the treasurer of the State annually, a return sworn to by him before some justice of the inferior court or of the peace, in which shall be stated the amount of the *capital stock actually paid in* on the first day of January preceding . . . . . ."

Act. December 15, 1862, Acts 1862, p. 59. "No bank or other corporation shall be required to pay tax on bonds of this State or the Confederate States in any case in which said bonds are already taxed as *part of their capital stock*, but shall pay on the whole

of their *capital stock*, and on all such bonds held by such bank or other corporation *over and above their capital stock.*"

Act of February 28, 1874, Acts 1874, p. 103. (Code of 1895, Sec. 780.) "Sec. 1. From and after the passage of this act, the presidents of all the railroad companies of this State shall be required to return on oath annually to the Comptroller-General, the value of the *property* of their respective companies, without deducting their indebtedness; each class or species of property to be specially named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller-General."

Constitution of Georgia, of 1877, Article 7, Section 2, Par. 1. "All taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Par. 2. Provides for exemption of public property and some other classes, not embracing any sought to be taxed in this case.

Par. 3. "All laws exempting property from taxation, other than the property herein enumerated shall be void."

The material portions of an *Act approved December 17, 1902, Acts 1902, p. 37:* "Sec. 1. The term special franchise as used in this act shall include every right and privilege exercised within this State . . . . . for the exercise of the power of eminent domain . . . . . for the exercise of any public service, such as the construction and operation of railroads . . . . . for the common carrying of freight or passengers . . . . . ."

Sec. 2. On or before the first day of May in each and every year every person, partnership or corporation holding or owning and exercising any special franchise or franchises within the State of Georgia, shall make a special return . . . . . to the Comptroller-General, stating the value of said franchises as exercised within the State, etc. . . ."

Sec. 3. The Comptroller-General shall not be bound to accept the valuation assigned to such franchises in the return made, but it shall be his right and duty to review the same, and in case of his refusal to accept the return, the subsequent proceedings shall be in all particulars the same as are now provided by law in the case of his refusal to accept returns made by railroad companies of their physical property; and said franchises shall be taxed at the same rate as other property upon the value thereof as returned or if the value returned is not

accepted, upon the value as above ascertained, the said tax to be levied and collected as now provided in case of the property of railroad companies."

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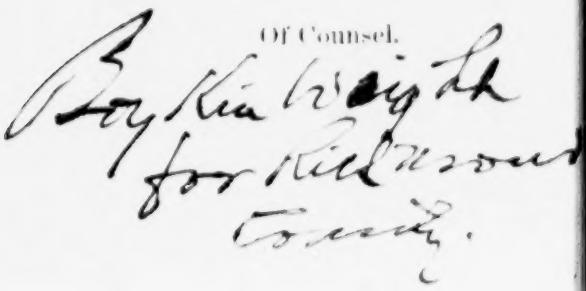
Attorney for Appellant.

SAM'L H. SIBLEY,

Of Counsel.



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JAMES H. McKENNEY,

Supreme Court of the United States

October Term, 1909.

No. 70.

WILLIAM A. WRIGHT, COMPTROLLER-GENERAL OF THE STATE OF GEORGIA, THE COUNTY OF WILKES, THE COUNTY OF TALIAFERRO,

vs.

THE GEORGIA RAILROAD AND BANKING COMPANY.

Supplement to Brief for Appellants.

Appellants, having served opposing counsel with a copy hereof, ask leave to file the following supplementary suggestions:

1. It is the **"Stock"** of said Company that is to be exempt for seven years and then taxed only to a certain limit.

It is not the **"Company"** that is exempt. The corporation and anything it owns may be taxed, provided the thing taxed is not the "stock of said company".

It is not the **"property"** of the company, not yet the **"railroad and its appurtenances"** as in the Central charter, that is declared exempt, but the "stock" only. In the Eatonton Charter of 1831 substituted by the charter under construction, the **"stock and the real**

estate" of the company were exempt, but here the "stock" only.

It is not the **"investments"** that are declared exempt. They cut no figure during the seven years of complete exemption, and are thereafter referred to only as affording, through a per cent. of their income, a **measure** for the tax. **Any other measure** might have been agreed on, as for instance, a per cent. of the passenger fares, or the tax laid on bank stock, or some fixed limit as $1,000 per annum. It is the "stock of the company" that is agreed to be exempt, and not the investments.

2. What then **is** the "stock of the company"? Let the contract answer: Act 1833, Sect. 3, **"The stock of said company shall consist** of 15,000 shares of $100 each". It is either the **shares** or $1,500,000 of wealth. This section gave a right of increase, but the Act 1835 abrogated the right, declaring: "The stock of said company **shall consist of Two Million Dollars"**. The Act of 1847 permits an increase, to an amount **"not exceeding Four Million Dollars".**

All the Acts constituting the full contract may be searched in vain for a **single instance** where "stock" is used to mean the "property" of the corporation. The property may fluctuate, increase or decrease in value, be destroyed or added to by investing earnings instead of declaring dividends, or by borrowing money. None of these accidents affects the "stock of the company". The limit for the "stock" fixed by the Legislature cannot be exceeded by the corporation.

If the exempt "stock" were all the property of the corporation, then Act 1835, Sect. 8, IV, that dividends might be declared from the **net profits** but the

capital stock should never be impaired, would be meaningless. For any dividend would impair the amount of the property of the corporation. This provision clearly recognizes that the "net profits" are no part of the "stock". They are the excess of wealth over the amount fixed as "stock". If not paid out as dividends, the excess becomes surplus.

3. If the "stock" be not the shares, but, as heretofore assumed by the Georgia Court, is the dollars (not exceeding four millions) paid by the subscribers to the corporation; then the property bought with those dollars, though it is not strictly the stock, yet may equitably be treated as representing the stock in the matter of taxation. Had a single, unchanging article been bought, that article, notwithstanding fluctuations in its value, might be claimed to represent the stock. But the amended answer shows that nothing bought with the dollars of this stock survives except the land of the right of way. If the "pedigree of the property" be looked to, the only pure representative of the "stock" is the right of way. All else has been renewed again and again, with enlargements and betterments. To the extent that the renewals are more valuable than the original investment, they represent profits and not "stock". Where the specifics are constantly changing, there is no practical basis to estimate what part of the assets represents stock, except to assume the original stock to be a constant always reappearing in the property. All else is profits, or an increment derived from new and unexempt stock, or from loans. This company has invested not less than $1,000,000 the proceeds of bonds.

4. This is just in this case; because the State, while contracting that the tax on the "stock" should

not exceed a certain measure, also exacted a contract that the stock itself should **not exceed** $4,000,000.

Profits declared as dividends, would become taxable wealth in the State. If held by the corporation as surplus instead of declared in dividends, it is still taxable. Not **all** property, but only such as **represents the stock,** can be claimed as exempt in the hands of the corporation.

5. Investments **not in the scope of the charter** do not properly represent the "stock". The Georgia Court has always recognized this distinction. There is thus a limitation as to the **nature and use** of the property.

Investments which **exceed the amount** of the permitted stock cannot as to the excess represent the exempt stock. The surplus is surplus and not stock. There is also a limitation, recognized by this Court and the Georgia Court, as to the **value** of the property.

The franchises were **not paid for** with any of the dollars of the original stock, but **added to them** by the State. The franchises therefore do not and never did **represent** any of the exempt stock. There is a limitation as to the **origin of** the property.

Any property of the corporation that fails by **any** of these tests fairly to represent the **"stock",** is taxable; for the charter does not exempt the **property of the corporation,** nor the **corporation,** but the **"stock"** of the corporation.

6. The practical clumsiness of taxing part of the company's property according to the measure of the charter, and part by the ad valorem tax laws, is unavoidable so long as the company insists on its charter right. It disappears if the "stock" means the

shares of stock, for then all the property is taxable under the law.

If otherwise, the result is this:

The Washington Branch, as a separate road, must be **separately** returned and taxed.

The return for the railroads built under the original charter will show the market value of all property including the franchises. It will also show the net annual income of the company's investments **in these railroads.** Of the values thus shown, $4,000,000, **representing** the original stock, is taxable by the measure fixed in the charter. The surplus, including the franchise, is taxable under the law. If the charter were strictly construed, the $4,000,000 might have to pay a tax equal to one half per cent. of the net income of **all** the investments made under the original charter (excluding the Washington Branch); but a fair construction would be to **apportion** the net income between the "stock" and the "surplus", and assess the tax by the net income of that portion of the investments which **represents the stock.** On $4,000,000, the agreed stock, the State would then receive the agreed restricted tax. On the excess which the company has accumulated, taxes would be paid as upon all other property in the State.

There would then be no suggestion of double taxing, as in the Western and Atlantic Railroad case. That railroad, however, had the immunities of the Central Railroad, as well as the Georgia Railroad, and the Central had an exemption of its "railroad and appurtenances": See W. and A. vs. State, 54 Ga. at page 429.

7. Ever since 1874 the same clumsiness has existed. The returns of the company have put the railroads and appurtenances at $4,200,000, and as stated in the petition and illustrated in Exhibit A, have also shown "other property". The latter item, and $44,000 of the former has been taxed at the ad valorem rate. the remaining $4,156,000 has been taxed by the measure of one half per cent. of the net annual income. Whether the income has been apportioned as now suggested, we are not informed. The officer making the returns alone knows. We are now but insisting, on new information, that very much more property should be taxed at the ad valorem rate.

JOHN C. HART,
Attorney for Appellants.

SAML. H. SIBLEY,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 70.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia; the County of Wilkes and the County of Talliaferro, Appellants,

vs.

THE GEORGIA RAILROAD AND BANKING COMPANY.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Brief of Ligon Johnson for Appellant, the County of Wilkes and the County of Talliaferro.

Geo. P. Wheat, Law Printer, 118 Nassau St. 'Phone 7856 Cort.

In the Supreme Court of the United States

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vs.

THE GEORGIA RAILROAD AND BANKING COMPANY.

Brief of Ligon Johnson, of Counsel for the Appellants, the County of Wilkes and the County of Talliaferro.

STATEMENT.

The initial machinery for the collection of all railroad taxes in Georgia, both for the State and the several counties within the State, is supplied by the Comptroller of the State, and without such machinery no tax may be enforced by either the State or

counties. Against this official the Georgia Railroad and Banking Company in January, 1904, filed its bill seeking to prevent the collection of a property tax upon approximately two million dollars of its railroad property; to prohibit all proceedings by the Comptroller toward taxation or the issuance of any tax certificates or liens whatsoever for the benefit of either the State or counties, under any property tax assessment made or to be made against it, and to enjoin all proceedings to assess or tax the franchise of the railroad company under a then recently enacted "Franchise Tax Act," the railroad company asserting a charter immunity from all taxation by either State or counties beyond an annual contribution to the State of one-half of one per cent. of its net income, which contribution it alleged to have tendered in settlement of its taxes, and which the Comptroller, William A. Wright, had refused to accept as a compliance by the railroad company with its obligations.

The Court issued a blanket temporary injunction which prohibited the Comptroller from taking any steps whatever, for the benefit of the State or counties, toward collecting any taxes or issuing any certificates or liens under which the State or counties could proceed.

The only medium provided by the State of Georgia for the assessment and collection of railroad taxes by its counties being primarily through proceedings and certificates or liens issued by the Comptroller of the State, all of which were enjoined under the order of the Court, the Counties of Wilkes and Talliaferro, in which the Washington Branch of the Georgia Railroad was wholly located (a separate and branch road specifically ex-

cluded in terms when its building was authorized and the road constructed from any exemption whatever under the original charter of the Georgia Railroad), filed their interventions in this cause setting up their special rights in relation to the Washington Branch Road, which rights were applicable to no other counties and to no other property of the Georgia Railroad and nowhere else asserted; praying a modification of the temporary injunction, authority for the Comptroller to proceed in the taxation of the Washington Branch Road and the stock issued therefor, and for general relief.

Hearing upon the interventions was postponed from time to time, and, to speed the cause and dispose of the entire matter at one hearing, upon due motion, without objection, Wilkes and Talliaferro Counties were made parties defendant, were authorized to adopt the demurrers and pleas of the defendant William A. Wright, which was done, and such demurrers and pleas were overruled, and to re-file their interventions as their answers to the bill. The interventions were thereupon re-filed as answers and the entire cause submitted upon bill and answers, upon which the case thereafter proceeded, and a decree entered, enjoining the collection of any taxes by either the State or counties, upon the main line and properties of the Georgia Railroad and Banking Company, the franchise of the company, or the Washington Branch Road, the Court holding all to be exempt under the original charter of the Georgia Railroad and Banking Company.

The defendants, Wilkes and Talliaferro Counties rely upon defenses asserted them alone and not embraced in the answer of the Comptroller or elsewhere. These defenses are applicable chiefly to

Wilkes and Talliaferro Counties, in that they mainly relate to the Washington Branch Road, which lies exclusively within these counties, and are—

I. The Washington Branch Road, and the $200,000 of stock issued by the Georgia Railroad and Banking Company on account thereof, were not within the charter exemption of the Georgia Railroad, but such Branch Road was authorized and built and the $200,000 of stock issued under subsequent specific and outstanding charter amendments of the Georgia Railroad and Banking Company, which in terms provided that such Branch Road and the stock issued therefor should be taxed as all other property in the State of Georgia. This is admitted by the pleadings and evidenced by the statutes of Georgia.

II. That had there been no such charter provision the Washington Branch Road would be liable to general taxation even though the main line and other branches of the Georgia Railroad might be exempt, in that the Washington Branch was built under consolidation with another company, in neither the charter of which, nor the act permitting consolidation, was there any tax exemption.

III. That the exemption under the original charter for the main line (also partly located within these defendants' boundaries), and all other lines authorized thereunder, was but for a period of thirty-six years from the completion of the main line of the road, such completion being in the year 1845, and all charter exemptions terminated in 1882.

These appellants will not argue any of the defenses raised by William A. Wright, the defendant in chief of the lower Court, but will confine themselves solely to the three defenses specially asserted by them, the same being embraced under the fifteenth, sixteenth and seventeenth assignments of error.

Authorities.

While the pleadings directly admit each of the contentions of the defendants, Wilkes and Talliaferro Counties, in this regard, in order that the Court may have a full information, I herewith submit a brief legislative history of the Washington Branch Road.

In 1836 the first legislative enactment in relation to the construction of the Washington Branch Road appears. (Acts Ga., 1836, p. 208.) The act provided authority for a separate Branch Road organization, for the benefit of which $2,000,000 of stock might be issued, the organization to be under the general direction of the Board of Directors of the Georgia Railroad and Banking Company. The "stockholders" in the "Branch Railroad" were to "enjoy all the privlieges that are secured to the stockholders" of the Georgia Railroad and Banking Company. No exemption from taxation was given, nothing was ever done under this act, no stock was issued, no subsidiary organization formed, nor were any steps whatever taken.

As nothing was done toward building a branch road to Washington under the Act of 1836, the Legislature, two years later, granted a charter (also

without tax exemption) to the Washington Railroad and Banking Company, the company being authorized to build a railroad from Washington to connect with the main line of the Georgia Railroad and Banking Company. (Acts 1838, p. 192.) This corporation was never organized, nor were any steps taken toward constructing the road until more than twelve years later, under subsequent enactments.

In December, 1849, about five years after the construction of the main line of the Georgia Railroad and Banking Company, the main line being completed in 1845 (Record, pp. 26 and 31), the Georgia Railroad and Banking Company again applied for legislative authority to build a branch road from its main line to Washington, Wilkes County. The application was granted under act approved Dec. 20th, 1849, which was as follows:

> "The power heretofore granted to the Georgia Railroad & Banking Co. to construct a branch of their road to Washington, in the County of Wilkes, be, and the same is, hereby revived and authorized to be exercised by said company, provided that the amount of the increased stock of said company ($200,000) shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the legislature may hereafter impose." (Acts 1849-50, p. 239.)

The sole authority and charter provision of the Georgia Railroad and Banking Company, under which the present Washington Branch was authorized and constructed, is embraced in the foregoing

enactment, together with the act of consolidation with the Washington Rail and Plank Road Company, which Acts are still in full force and effect.

As the people of Washington were clamorous for railroad connection, and the previous legislative authorizations had produced no results toward a railroad to Washington, the same Legislature enacting the foregoing amendment to the charter of the Georgia Railroad and Banking Company, at a later session (Feb. 5th, 1850) also gave to certain named citizens of Washington and vicinity authority to build a road and to issue $200,000 stock therefor. This authority was in the following terms:

> "That (naming incorporators) be and they are hereby authorized to build, construct and keep a plank or rail road from the town of Washington, in Wilkes County, to some point on the Georgia Railroad & Banking Company's Railroad, and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding $200,000, and shall be authorized to exercise all the powers and privileges conferred by the act of the General Assembly, passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained." (Acts 1849-50, p. 219.)

As will be seen, none of the immunities contained in the original charter of the Georgia Railroad and Banking Company were conveyed by the act of Feb. 5th, 1850, nor were any tax exemptions whatsoever embraced therein.

Facts were not at hand to show how far construction of separate roads was accomplished under these two acts, but, in all events, before completion

of either application to the Legislature for permission to consolidate and complete a single road was made, which application was granted as follows:

> "That the Georgia Railroad & Banking Company and the Washington Railroad or Plank Road Co. be authorized and empowered to consolidate their stocks, the said Georgia Railroad & Banking Co. issuing stock in their said company to the stockholders of the Washington Railroad or Plank Road Co. on terms of equality with the general stockholders in amount equal to the amount held by them respectively, and the stock of the Washington Railroad or Plank Road Co., and that the two companies aforesaid, after the consolidation of their stock, shall be known as one corporate body under the name and style of the Georgia Railroad & Banking Co., and that said corporate body shall be authorized to exercise all the powers and privileges *conferred by existing laws upon the Georgia Railroad & Banking Co., and be under all the liabilities and restrictions imposed upon the same.*" (Act Jan. 21, 1852; Act of 1851-2, p. 120.)

The consolidation was duly accomplished, the $200,000 exchange of stock was made, the road built and is now held, owned and operated under these acts, which are now outstanding and in full force, and are the sole enactments concerning the Washington Branch Road.

Here then is, *first*, a charter amendment declaring in terms that the road and the $200,000 stock to be issued on account thereof, taxable as all other property, the act specifically declaring that there should be no tax exemption; *second*, authority in a separate corporation to build, under which act no

immunity from taxation is given; *third*, the act of consolidation, permitting same under the explicit declaration that the consolidated company should be under all the liabilities and restrictions imposed upon the Georgia Railroad and Banking Company by the then "existing laws," which laws provided that there should be no exemption.

All these facts are admitted by the pleadings. Even were they not, the road would not be heard to deny its authority and responsibility under these acts, as it declares its ownership and operation of the Washington Branch Road in its tax returns, which road it can hold and operate only by virtue of these acts.

Under the record and the law these appellants respectfully insist that the matter of the liability of the Washington Branch Road to taxation is not an open question.

The sole grounds for any claim of exemption was based upon two decisions of the Supreme Court of Georgia, each entitled The State vs. The Georgia Railroad and Banking Company.

The question of the liability of the Washington Branch Railroad was not before the Court in either case, nor were the facts in relation thereto shown or the charter amendments and legislative enactments governing the Washington Branch plead, asserted or before the Court.

The first case was but a proceeding for injunction under an affidavit of illegality to a single general tax lien or *fi fa* to enforce taxes under a general assessment upon $2,700,000 of property, more than three-fourths of the then total value of all of the company's property of every kind. The illegality was sustained and the injunction granted. The only

reference to the Washington Branch Road in this case was the erroneous claim that the consolidation of the Georgia Railroad and Banking Company with the Washington Railroad or Plank Road Company had forfeited all the exemption originally given the Georgia Railroad for its main line and branches authorized under the charter of 1833. The question of the liability of the property of the Washington Branch Railroad or stock issued therefor was in nowise touched upon, and in the decision (Record, p. 60), the Court declaring: "I make no determination on any property except that specified."

The remaining decision (Record, p. 75 *et seq.*), by Justice McKay of the Supreme Court of Georgia, in no manner declares tax immunity for the Washington Branch Road, but, on the contrary, contains a general declaration, which, when analyzed, shows that under this decision the Washington Branch Road, and stock issued on account thereof, should be subject to taxation. In the latter case the Court holds (Record, p. 78): "As to the surplus on hand or any investments not strictly within the enterprise contemplated in the charter, we are clear that this is taxable." The Washington Branch Road being excluded from the charter, not being begun until about twenty years thereafter, and then under a charter amendment specifically making it liable to taxation, could hardly come within "the enterprise contemplated in the charter."

Had the facts in these cases been otherwise and the Court directly decided that the property embraced in the Washington Branch Railroad was exempt, such decisions would not control, as the laws of a State are expressed by its duly enacted statutes, unless some are unconstitutional or void.

The Honorable Court, in the case of Swift vs. Tyson (16 Pet., p. 18), declared that "The decisions of the Courts do not constitute laws. They are at most only evidence of what the laws are and are not themselves laws." In Bull vs. Van Ness, 8 Wheat., 322, and in effect in Gilpcke vs. City of Dubuque, it is declared that the courts of the United States will not follow the erroneous construction of State statutes adopted without due examination by a State court. The decisions relied upon by the Georgia Railroad do not assert an exemption of the Washington Branch Road; and, if a strained construction could exhibit such a conclusion, it is respectfully urged that this Court would not accept these decisions as the law of Georgia in the face of the valid and existing statutes.

II.

Even had there have been no specific provision in the charter of the Georgia Railroad and Banking Company making the Washington Branch Road liable to taxation, the exemption of the original charter could not have applied to this Branch Road and the stock issued therefor, as this road and stock were liable to taxation under the charter of the Washington Rail or Plank Road Company (Acts of Ga., 1849-50, p. 219) and the act of consolidation of this road with the Georgia Railroad and Banking Company (Acts 1851-2, p. 120).

An examination of the only case in which the question of this consolidation was raised (State of Georgia vs. Georgia Railroad and Banking Com-

pany, cited *ante*, Record, p. 56), and the case upon which the railroad company bases its claims of immunity, will disclose that it had no bearing whatever upon the Washington Branch Road. The single point in that case was whether or not the Georgia Railroad and Banking Company had not forfeited all immunity it might have had under its original charter by the consolidation. The Court properly held that it had not, as under the consolidation, without special provisions to the contrary, each road must have continued to enjoy the immunities and privileges and be subject to the same duties and burdens as provided in their respective charters.

The charter of the Washington Rail and Plank Road Company merely gave to it "the powers and privileges" of the Georgia Railroad and Banking Company, making it liable to all the "liabilities and restrictions" imposed upon this corporation (Acts 1849-50, p. 219), among which was the payment of taxes on the Washington Branch Road. Even had the Georgia Railroad and Banking Company enjoyed complete immunity from taxation, the grant of such "powers and privileges" as that road may have had to the Washington Rail and Plank Road would have conveyed no immunity from taxation.

No exemption from taxation can be made by implication, and extending to one corporation the "powers and privileges" previously conferred upon another will not convey immunity from taxation.

R. R. Co. vs. Gaines, 97 U. S., 711.
Phoenix Ins. Co. vs. Tenn., 161 U. S., 177.
Pecard vs. Tenn. R. R., 130 U. S., 642.

Home Ins. Co. vs. Tenn., 161 U. S., 200.
Covington vs. Sanford, 164 U. S., 588.

Exemptions from taxation are regarded as in derogation of sovereign authority and common rights and not to be extended beyond exact and express requirements of language used, construed *strictissima juris.*

Yazoo R. R. vs. Thomas, 132 U. S., 185.
Ford vs. Delta Land Co., 164 U. S., 666.

In the case of Tomlinson vs. Branch, 15 Wall., 460, the Court declares:

> "Where a railroad company by its charter was granted such an exemption for a limited period and afterwards merged into another railroad company, which became invested with all its property rights and privileges, the exemption with its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the compnay so acquired without express words or necessary intendment to that effect.
>
> "Where two railroad companies are consolidated, the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens already attached thereto, unless the contrary is expressed."

There is in fact a case on all fours with the case at bar (eliminating this case's most potent factor, the specific charter declaration of liability to taxation), a case heard on writ of error from the Supreme Court of Georgia, involving an almost identical consolidation.

The act of consolidation of the Washington Branch Road with the Georgia Railroad was as follows:

> "That the Georgia Railroad and Banking Co. and the Washington Railroad or Plank Road Co. be authorized and empowered to consolidate their stocks, the said Georgia Railroad and Banking Co. issuing stock in their said company to the stockholders of the Washington Railroad or Plank Road Co., and that the two companies aforesaid, after the consolidation of their stock, shall be known as one corporate body under the name and style of the Georgia Railroad and Banking Co., and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Co., and be under all the liabilities and restrictions imposed upon the same." (Act Jan. 21st, 1852. Act of 1851-2, p. 120.)

The consolidation of the Macon & Western and Central Railroad was in the following language (Central R. R. & B. Co. vs. Ga., 92 U. S., 667):

> "Be it enacted by the General Assembly of the State of Georgia that the Macon & Western R. R. Co. and the Central Railroad & Banking Co. of Georgia, be, and they are hereby, authorized and empowered to unite and consolidate the stocks of the two said companies, and all the rights, privileges, immunities, property and franchises belonging to or attaching to said companies, under the name and charter of the said 'The Central Railroad & Banking Co. of Georgia,' in such manner that each and [illegible] owner and holder of shares of the capital stock of the Macon & Western Railroad Co. shall be entitled to receive an equal number of shares

of the capital stock of the consolidated companies."

In construing the Central Railroad & Banking Company's charter and consolidation, the Court held (pp. 675-76) that even though the State of Georgia had not specifically declared that no exemption should exist under this consolidation, the exemption of the charter could not apply to any branches subsequently authorized, unless extended to them in terms. For further decisions in this connection see:

C. & O. R. R. vs. Va., 94 U. S., 726.
State vs. Keokuk R. R., 99 Mo., 36; 152 U. S., 305.
Wilmington R. R. vs. Alsbrook, 146 U. S., 300.
Keokuk R. R. vs. Scotland Co., 152 U. S., 325.
Central R. R. vs. Wright, 164 U. S., 331.
Yazoo R. R. vs. Adams, 180 U. S., 25.

III.

The tax exemption clause in the charter of the Georgia Railroad and Banking Company for the main line and specified branch line, construed alone, and without regard to the provisions making this grant defeasible at the will of the Legislature, is not necessarily perpetual, and, under the view of these appellants, is but for the period of thirty-six years from the date of the construction of the main

line. The main line of the road was completed in 1845 (Record, pp. 26 and 31), and, in consequence, exemptions ceased in 1882. Both cases relied upon by the railroad company to establish its immunity were within the period in which the exemptions applied, but neither cover any time after the expiration of the thirty-six years. The charter exemption is contained in clause 15 of the Act (Acts 1833, p. 256), which clause first fixes the exclusive right of the Georgia Railroad for the period of thirty-six years from the date of the completion of the road and in the last clause wholly exempts the stock of the road and its branches from taxation for a period of seven years "and after shall be subject to a tax of not exceeding one-half of one per cent. per annum upon the net proceeds of their investments." It is respectfully urged that the tax exemption under the immunity clause alone only extended thirty-six years as fixed by the first section of the charter.

IV.

Even though it be admitted, however, that the tax exemption of the original charter to the main line and three specified branches be in language which could be construed as without limit as to time, this grant could not be or become a vested right, as, under the specific terms of the charter it could be divested at any time after the year 1882. Section 15 of the charter is as follows:

> "That the exclusive right to make, keep up and use the railroads and transportation authorized by this act shall be for and during the

> term of thirty-six years, to be computed from the time when said road from Augusta to either of the points hereinbefore designated shall be completed for transportation * * * nevertheless the Georgia Railroad shall remain and be incorporate and invested with all estate powers and privileges as to their own works herein granted the secured, except the exclusive right to make, keep up and use the railroads over and through such parts of the country that shall so have expired by the foregoing limitation, but the Legislature may renew and extend that exclusive right upon such terms as may be prescribed by law and be accepted by said incorporated company."

That the exclusive right to the railroads of the Georgia Railroad and Banking Company expired in 1882 is no longer an open question. This Honorable Court in the case of Georgia Railroad and Banking Company vs. Smith, 128 U. S., 180, declared:

> "The section grants to the company the exclusive right of transportation of persons and merchandise over its road, a right which in another part of the act is limited to thirty-six years and then expires unless renewed by the Legislature upon such terms as may be prescribed by law and accepted by the company. This period has long since expired, and we are not informed that any renewal of the privilege has been made."

It was not the intention of the Legislature to grant nor did the incorporators believe that they were to receive any right which the State might not burden as it saw fit at the end of the thirty-six

years. As this Court in the Smith case observes, the railroad was viewed in the nature of a toll turnpike, from which the builders would derive their profits in thirty-six years, and after that time the State might, at its option, exercise joint use or declare the roads free to the public.

Beyond the simple franchise to continue to be, to exist merely, no actual franchise remained in the Georgia Railroad Company beyond the thirty-six years. The right to exist only was a valueless right, for nothing under this was given, and therefore any additional right or franchise exercised by the road after 1882 was subject to such burdens, including the levy of a franchise tax, as Georgia saw fit to enact. It is immaterial whether the franchise exercised was by legislative act or legislative silence, for there has been a franchise exercised by the road since 1882, a franchise worth hundreds of thousands of dollars. In 1882 and at all times since the Constitution of Georgia has prohibited any immunity from taxation by legislative act or otherwise and no renewal of the Georgia Railroad's original franchise could permit it to escape taxation.

Furthermore, the Georgia Railroad has continuously asserted, and by the State of Georgia been permitted to exercise exclusive right to all the Georgia Railroad and Banking Company railroad property. While there was no renewal of the exclusive right in terms by the Legislature, Georgia duly enacted its tax laws and made provisions applicable to the Georgia Railroad and Banking Company and all other railroads, these taxes and regulations being the only return demanded by Georgia from the Georgia Railroad and Banking Company for the valuable exclusive rights to the railroads and the

franchises it permitted the Georgia Railroad and Banking Company to exercise.

The use of the Georgia Railroad and Banking Company railroads were not only valuable to that company but a joint use by Georgia with the Georgia Railroad Company would have been of immense value to the State. The State of Georgia is the sole owner of the Western and Atlantic Railroad, an unchartered road, a work of internal and public improvement by the State (Acts Ga., 1836, p. 214), extending from the Tennessee River, at Chattanooga, in the State of Tennessee, to Atlanta. The Georgia Railroad affords the outlet to Southeast Georgia, the Carolinas and partly to tidewater. The Georgia Railroad receives much of its freight and passenger business through the Western and Atlantic. Its lines, if open to the Western and Atlantic, would double the mileage of that system and make the Western and Atlantic a much more powerful and profitable factor in the railroad world.

In the face of all this Georgia has been content to permit the Georgia Railroad and Banking Company to exercise exclusive use of and authority over the lines of railroad in which the State had a joint right, exacting in return only such burdens as she might impose upon all other railroads and railroad property. It is respectfully urged that the Georgia Railroad and Banking Company, after having exercised such exclusive right, will not now be heard to deny its liability to taxation upon the lines of roads originally exempted under its charter.

These appellants, therefore, insist that the Washington Branch Road and the $200,000 of stock issued on account thereof, are now, and have at all times been, liable to taxation; that the main line

and three branch lines of the road exempted under the charter of 1833 have been at all times since 1882 liable to taxation; that these appellants are entitled to their taxes upon the Washington Branch Road from 1852 until the present time, and their *pro rata* of the taxes upon the main line and branch lines of the Georgia Railroad and Banking Company from 1882 until the present time; that they are further entitled to their *pro rata* of taxes upon the valuable franchises exercised by the Georgia Railroad from the passage of the franchise tax act to date; that the Comptroller should and is in duty bound to provide the *fi fas* upon which such taxes may be collected for the benefit of these appellants.

Respectfully submitted,

LIGON JOHNSON,
For Appellants, Wilkes County and
Talliaferro County.

Office Supreme Court, U. S.
FILED.
JAN 17 1910
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States

October Term, 1909.

No. 70.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; THE COUNTY OF WILKES AND THE COUNTY OF TALIAFERRO, APPELLANTS,

vs.

THE GEORGIA RAILROAD AND BANKING COMPANY.

SUPPLEMENT TO BRIEF OF JOSEPH B. CUMMING, FOR THE GEORGIA RAILROAD AND BANKING COMANY.

Supreme Court of the United States

October Term, 1909.
No. 70.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; THE COUNTY OF WILKES AND THE COUNTY OF TALIAFERRO, APPELLANTS,

vs.

THE GEORGIA RAILROAD AND BANKING COMPANY.

Supplement to Brief and Argument of Joseph B. Cumming, for Appellee.

Appellee ask leave to submit the following short Supplement to the Brief of its Counsel, Joseph B. Cumming, to-wit:

1. The principal Appellant in this case does not by his pleadings make the issue that The Georgia Railroad and Banking Company lost any of its privileges or franchises by the expiration of thirty-six years. This issue is raised only by the Intervenors. This is mentioned as a fact without any suggestion of deductions to be drawn from the fact.

2. The exclusive privilege to which this limitation applied is first mentioned in the second Section of Appellee's Charter.

See Acts of the Georgia Legislature of 1833, page 256, Section 2nd.

3. This exclusive privilege is again mentioned in Section 15 of Appellee's Charter. (See Acts Georgia Legislature supra). This is the only privilege of Appellee to which the limitation of thirty-six years applied. This privilege, as above stated, is mentioned first, but in general terms, in Section 2nd of the Charter, and the Legislature recurs to it in Section 15 of the Charter, in which Section the terms and conditions on which the privilege was to be enjoyed by Appellee are fully set forth. It was a monopoly of railroad building within certain territorial limits, to-wit: twenty miles on either side of the road of Appellee. There can be no doubt, when one considers the language of Section 15 on this subject, that the limitation applied to the enjoyment of this territorial monopoly and to nothing else.

4. As a matter of fact this privilege of a monopoly never went into effect, for, as appears from the record, Appellee never complied with the terms and conditions on which it was to be effective. It never became any operative part of Appellee's Charter. It was as if it had never been. The privilege which was to be limited to thirty-six years was never acquired at all for any period whatever by Appellee, and there has never been a day when Appellee could have excluded other railroads from the designated territory. It might be said that this part of Appellee's Charter had expired after the lapse of thirty-six years, but for the fact that it never existed at all. That which never lived cannot expire. This provision of the Charter was never actual but only potential. The potentiality never matured.

Office Supreme Court, U. S.
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No. 70.

Supreme Court of the United States

October Term, 1908.

[redacted]

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; THE COUNTY OF WILKES, AND THE COUNTY OF TALIAFERRO, APPELLANTS,

vs.

THE GEORGIA RAILROAD & BANKING COMPANY.

BRIEF AND ARGUMENT OF JOSEPH B. CUMMING FOR APPELLEE.

I.

EXCEPTIONS OF APPELLANT.

The first exception is that mal-administration of a valid Act makes no Federal question.

To this I reply:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar cir-

cumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo vs. Hopkins, 118 U. S. 356, 373.
Henderson vs. Mayor of New York, 92 U. S. 259.
Chy Lung vs. Freeman, 92 U. S. 275.
Ex parte Virginia, 100 U. S. 339.
Neal vs. Delaware, 103 U. S. 370.
Soon Hing vs. Crowley, 113 U. S. 703.
Scott vs. McNeal, 154 U. S. 34.
Chicago B. & Q. R. R. vs. Chicago, 166 U. S. 226.
N. C. & St. R. Ry. vs. Taylor, 86 Fed. 168.

The second Exception is that no question is made by Complainant as to the valuation of the property. This is true when the value is considered without reference to taxation. The complaint is that when the railroad's property is considered for taxation, its full market value is taken for that purpose; whereas all other property is taken, for the same purpose, thirty-five, forty or an even greater percentage below its market value.

The third Exception is that Complainant cannot be heard as to over-valuation until tender is made of taxes on an admitted valuation.

Record 10.

This Exception would be well taken if the whole of Complainant's case were embraced in the Paragraph of the Bill (24th) excepted to. That is to say, if the whole of Complainant's complaint was that Complainant was discriminated against by the taxing authorities in the way indicated, then the exception would be sound.

But this is only one feature—and one of the least important—of Complainant's case. The body and soul of that case is that Complainant's property is not taxable at all at any valuation, admitted or disputed. Surely the whole case ought not to be given up for this one feature of it.

APPELLANT'S PLEA OF RES JUDICATA.

This plea rests on the case of Goldsmith, Comptroller General, vs. The Georgia Railroad and Banking Company, 62 Georgia Reports 485. It is claimed that there was a valid judgment in that case, by which Appellee is forever estopped, to the effect that Appellee's tax exemption or limitation applied only to so much of its property as equaled in value the par of its stock, say $4,150,000; and that the surplus of property over and above that amount was taxable like the property generally of the State.

To his I reply that, as hereinafter elaborated in another part of my Brief and Argument and as held by the Circuit Court in the Opinion which appears in the Record, (Record pages 21 and 22), what is relied on by Appellant as a judgment between the parties was flagrantly **obiter dictum** outside of any issue, made by the pleadings in the case, in which the **dictum** was delivered.

II.

The provision of the charter of The Georgia Railroad and Banking Company, upon which the question of taxing that Company must turn, is found in the 13th Section of the Act of December 21, 1833, and is as follows:

"The stock of the said Company and its branches, shall be exempt from taxation for and during the term of seven years from and after the completion of

the said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent.—(construed to mean 'one-half of one per cent.' —52 Ga. 491) per annum on the net proceeds of their investments.

Instead of speaking of this provision of the charter as furnishing to the corporation an exemption from taxation, it should be looked at as providing a scheme of taxation. The State did not exempt the corporation from taxation, but provided a method of taxation, to-wit: an income tax. The State was dealing with the corporation as a contracting party, whom it refused to relieve from taxation but with whom it stipulated to require only an income tax.

The penultimate word "their" relates unquestionably to the word "Company." It is common even now, when legislative language has become more exact, to use a collective noun in the singular, and the pronoun, standing in its place, in the plural, and this inexactness, if it be such, was more frequent at the date of this charter. The sentence does not make sense unless you read "their" as if it were the same as "its," and meant "company's"—so that this part of the section would read: "Shall be subject to a tax not exceeding one-half of one per cent. per annum on the net proceeds of its—the company's—investments." The word "their" could not apply to "Railroads" or "Branches," for they had or made no "investments;" they were the things invested in. And yet those are the only plural nouns in the sentence to which the pronoun "their" could apply; but to apply it to them would be to make nonsense. The application, however, of a plural pronoun to a collective noun is common now, and was more common then. Unquestionably the correct reading is the one above

suggested,—"net proceeds of the Company's investments."

In support of this use of the word "their" as applicable to the word "Company" we refer to the following instances in this very charter:

Section 1 of the Charter: "The Company provided for in this Act and herein more especially incorporated and authorized, shall and may direct and confine **their** first efforts" etc.

Section 3: "The said Company shall be at liberty to enlarge **their** capital" etc.

Also in same Section the following: "Books for enlarging **their** capital" etc.

Also in same Section the following: "So as to make **their** capital adequate" etc.

Again: "It shall be lawful for the Company from time to time to invest so much of said parts of **their** capital or of **their** profits" etc.

Section 9: "The aforesaid Company * * * by **their** corporate name aforesaid, may sue," etc.

Section 10: "The said Georgia Railroad Company shall have power and capacity to purchase and hold in fee simple or for years, to **them** and **their** successors—"

Same Section: "In like manner to purchase any lands, etc * * * that **they** may find necessary."

There is almost no end to the instances in this Charter in which the pronouns "they," "their" and "them" relate to the word "Company."

Here then is a distinct, express, unequivocal, unambiguous declaration of the legislature, that it will not expect any taxation in any shape from the rail-

road company for a certain period of seven years; that after that period it will demand, in the way of tax, only a half of one per cent. of the net proceeds of the investments made by the Company.

III.

The first inquiry is what did the Legislature mean by the word "stock?"

In the first place, it meant capital stock.

There are various grounds for so stating:

In the first place, while the original charter, the Act of December 21, 1833, speaks of "stock", the subsequent Acts of 1835 and 1847, amending the charter, in speaking of the same subject, use the phrase "Capital stock," or "Capital." See Sections 3 and 5 of the Act of December 18, 1835, and Section 8 of the Act of December 25, 1847.

In the case of The City Council of Augusta vs. The Georgia Railroad and Banking Company, 26 Ga. 651, the Court, on pages 662-3 uses language which clearly indicates that the Court considered the word "stock" in the charter as meaning the same as "capital stock." The language referred to is as follows: "We think that this part of the charter means that the stock of the company as stock—as a unit—is alone what is to be subject to the tax; not parts of the stock as the part used in banking, nor the particulars, in which the stock consists, as the land, cars, rails, etc."

There can be no doubt that these "particulars" are part of the capital stock, and when the Court applies the term "stock" to them, it is evident that in the mind of the court, so far as this railroad charter is concerned, "stock" means capital stock.

In the case of the Rome Railroad vs. The Mayor and Council of Rome, 14 Ga. 275, a tax had been levied

on certain property of the railroad. Against this tax the railroad Company pleaded its charter, which exempted its stock from taxation. Upon the issue thus formed, the Supreme Court of Georgia held: "The property of the Rome Railroad * * * is part of its capital stock, and liable to taxation," etc.

In other words, the Legislature, by the original charter of The Georgia Railroad and Banking Company, and by amendments to the charter, prior to January 1, 1863, authorized that corporation to take subscriptions to the amount of $4,150,000. This was its capital stock. At first it was in the shape of cash; but it very soon assumed, as it was intended to do, a different form. It was "invested." Its "investments" were in a railroad and its appurtenances. These "investments" were the "stock" of the corporation, and as to them a scheme of taxation was agreed upon —to-wit: an income tax. The Legislature, after exempting the "stock" itself, imposed a tax of one-half of one per cent. on the net earnings of the stock—thus declaring that the State would share with the adventurers the chances of the investment—get nothing if the experiment failed, and get more or less according to the measure of success.

IV.

From the moment this contract was made, it became immaterial what value the "stock," the capital stock, the "investments"—for these words mean one and the same thing—might gain or lose. The State never looked to them directly for its revenue, but to what they might earn. That they might earn anything at all—that the corporation might move or operate at all—the State gave it the franchise for a railroad company. This franchise became a part of the property of the railroad. It became a part of its

"investments." The corporation did not invest its $4,156,000 cash in dead rails and cross-ties and lands and engines and cars, which could not be used; but in those things vitalized by a franchise. These living things became its "stock." It was these living things, which were exempted from direct taxation and bidden to earn money as living things, and pay a part of their earnings to the State. It makes no difference that the franchise became a part of the property of the corporation by gift from the State. It was that part of its property without which the rest would not have existed. It was that part of the property of the corporation which was essential to the enterprise. It was a vital part of the "stock," the capital stock, the "Investments," the property.

It does not require any straining or any ingenious presentation of views to maintain that it was a necessarily implied part of the State's contract that the stock, which the State bound itself not to tax, was vitalized stock; and that the State which could alone give it life made, from the beginning, this contract: You, Railroad, get you together money, invest it in a railroad which, without more, will be worse than nothing, a waste; but I will give it the element of life. I will not tax this live thing; but you take it endowed with the life I shall give it, and earn money, pay your expenses and divide your net earnings with me.

V.

FRANCHISE A PART OF THE CORPORATE PROPERTY.

There can be no doubt at this time that the franchise of a corporation is a part of its property. The subject which we are dealing with—the taxation

of corporate franchises—proves this; a tax on the franchise is demanded by this syllogism of the tax gatherer: All **property** is subject to taxation. Franchises are **property.** Therefore, franchises must pay taxes.

Being property, it is also a part of the stock.

In Rome Railroad Company vs. City of Rome, 14 Ga. 275, the Court says, page 277: "It is conceded that the property (sought to be taxed) is such only as is necessary to conduct the business of the company. It is, therefore, a part of its stock."

In the Illinois case, so much relied on by the upholders of Franchise Taxation, State R. R. Tax cases, 92 U. S. 571, the franchise is considered as included in the capital stock. The language of the State Statute, which was under consideration, provided: "The capital stock of all companies * * * shall be so valued * * * to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such Company or association." Page 603.

In other words, capital stock of a corporation is something more than its tangible property, and that something more is its franchise.

By looking to valuation rather than to the things valued, the franchises give to tangible property a valuation which, without the franchise, it would not have, which valuation goes into the stock; and where a corporation is taxed on the value of its capital stock, the franchise is necessarily taxed when the stock is taxed.

"A statute which exempts from taxation the **stock** of a corporation is therefore held to exempt the **property** of the corporation of which its paper certificate of stock is but the representation. This is neces-

sarily so, for a different construction would render such an exemption entirely illusory."

IV Thompson—5577.

Exemption of the **stock** being exemption of the **property**, it includes in its operation **franchises**, i. e., a component part of the **property**.

In the case of Gulf and Ship Island Railroad Company vs. Hewes, 183 U. S. 66, it became necessary (page 76) to construe the following provision in a railroad charter, to-wit: "Such Company, its stock, its railroad and appurtenances, and all its **property** in this State, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty-five years from the passage of this Act." The court says, on page 77, that the law of the Supreme Court of the United States, so far as concerns railway franchises, was settled by the case of Wilmington Railroad vs. Reid, 13 Wall. 264, in which it was held that an exemption of the property of said company and the shares therein, extended to a tax upon the franchise. The following quotation was made from the decision in that case: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the Legislature, therefore, was not inhibited from taxing it. The position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in the case of a railroad is the privilege of running it and taking fare and freight—is the property and of the most valuable kind, and it cannot be taken for public use even, without compensation. It is true that it is not the same sort of property as the rolling stock, road-bed and depot grounds, but is, equally with them, covered by the

general term 'the property of the company,' and therefore, equally within the protection of the charter."

In the case of the Adams Express Company vs. Ohio, 166 U. S. 185, it is held: (See head-note on page 186) That the capital stock of a corporation represents not only its tangible property, but also its intangible property, including therein all corporate franchises and all contracts, privileges and good will of the concern; and when, as in the case of the Express Company, the tangible property of the corporation is scattered throughout different States, by means of which its business is transacted in each, the situs of this intangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done." This shows in the most forcible way the inseparability of **franchise** from **property.**

For the reasons hereinbefore stated, I claim:

1. The franchises of the Georgia Railroad & Banking Company are its property.

2. Being its property they are included in its capital stock.

3. That a special scheme of taxation is provided for its capital stock—all of it—every part of it—by which it is exempted from taxation, and an income tax is exacted by the assessment of a certain percentage of its net earnings.

4. The Legislature having declared that the property of every kind of the Georgia Railroad & Banking Company should pay taxes only in a certain mode—which mode had no reference to the value of said property, but only to its earnings—there could be no legal extension or amplification of, or variance from, this mode.

In this connection I quote from Raleigh & Gaston R. R. Company vs. Reid, 13 Wall, 269:

"When a Statute limits a thing to be done in a particular mode, it includes a negation of every other mode."

"It was the manifest object of the legislation which incorporated this company, to invite the investment of capital in the enterprise of building the road; and no means better adapted for the purpose could have been devised short of total immunity from taxation. As long as the capital was unproductive, it contributed nothing to the support of the Government, and even after it became remunerative, its contribution was fixed by the terms of its charter, and could not, in any event, exceed twenty-five cents on the shares of stock. The impolicy of this Legislation is apparent, but there is no relief to the State; for the rights secured by the contract are protected from invasion by the Constitution of the United States."

VI.

Is the Excess of Property, over and above the par of the stock ($4,156,000), liable to taxation?

This is one of the contentions of Appellant, and springs from the fact that Justice Bleckley, in the case of Goldsmith, Comptroller General, vs. The Georgia Railroad & Banking Company, 62 Ga. 485, elaborated such an id a through a page or two of **obiter dicta.** The **dicta,** delivered nearly twenty-five years before the present contention of the State, made, apparently, no impression on the distinguished counsel representing the then Comptroller General, or his successor, or their legal advisers. All parties concerned, the Railroad Company included, during a quarter of a century, ignored these **obiter** deliver-

ances. The Railroad Company, year after year, returned its "road and outfit" at $4,200,000, the authorized amount of its stock, and the Comptroller General, year after year, accepted that return. I shrink from the apparent presumptuousness of setting up my opinion in opposition to that of so distinguished a jurist as Judge Bleckley; but the facts warrant my making respectfully the statement that whatever there may be in general principles, there is no legal authority for the subtile and artificial process proposed by him in the case above cited. Even if I presumptuously take issue with the learned Judge's opinion, I at least avoid the folly of combatting a judgment of the court; for nothing is plainer than that the suggestion of the unprecedented method of taxing the Georgia Railroad & Banking Company was flagrantly obiter. The case, in which it was delivered, was one in which the Railroad Company sought to meet certain tax exemptions with affidavits of illegality. The judgment of the court was that the company had no standing in court for the reason that it had not made the return to the Comptroller General, which the Statute required as a condition precedent of litigation with the State, and that, therefore, the litigation should be dismissed. This judgment itself was rendered on a point never presented to the court, and was of the Court's own discovery. But it is not on this ground that I speak of Judge Bleckley's formula for taxing the Railroad Company as mere obiter.

The report of the case, and still more the pleadings and briefs of counsel will show that the following were the issues before the Court:

On the part of the Railway Company, that its charter exemption from taxation was protected by the Constitution of the United States, and could not be affected by the Railroad Tax Act of 1874.

This position was attacked by the Comptroller General on the following grounds:

1. The exemption clause of the charter was matter different from the title of the Act.

2. The charter itself did not purport to exempt more than $1,500,000 of the stock.

3. Whatever exemption the Company had prior to July 21, 1852, was lost by its amalgamation at that date with the Washington Road Company.

4. The Company was liable for taxes on certain specified properties not covered by its charter, and not employed in its railroad business.

The case is a very peculiar one in this respect, to-wit: The Court held that the case was improperly in court for lack of jurisdiction in the lower court, and directed that the case be dismissed. Nevertheless, it proceeded to decide the issues above stated—deciding them all in favor of the Railroad Company—and then went on to make deliverances on a subject not raised by the pleadings, and about which not one word had been uttered by counsel on either side; and to lay down a formula, which had not been discussed, or even thought of.

Indeed, we return again to the inquiry: From what source does Judge Bleckley get this formula? Not from the issues made in the case. Not from the arguments of counsel. Not from the judgment of the trial court. It is the product of a master mind, ingenious and subtile, responding to the "legislative longing to tax railroad property as other property is taxed." 62 Ga. 490.

We may with propriety assert that the decision in Goldsmith, Comptroller General, vs. The Georgia

Railroad & Banking Company, 62 Ga. 489, is not authority for the proposition that the excess of the value of the investments of that corporation in its railroad and appurtenances, over and above the par of its capital stock, is taxable. We can safely lay down the proposition that we can regard this question as remaining where it was placed by previous decisions, made on the pleadings in the cases, in which the decisions were rendered, and that it is unaffected by the **obiter** deliverances of Judge Bleckley in a case where the question, thus ingeniously dealt with, was not presented or argued.

In laying down this rule, Judge Bleckley, as he himself says in this **obiter** deliverance, "was taking a look at the property as distinguished from stock." There is no warrant for such a "look." What the charter scheme deals with is property, or "investments" as being the same thing as stock, and there is no justification for looking at them as distinct.

VII.

STATUTES AND DECISIONS—RES JUDICATA

I, therefore, proceed to discuss the statutes and decisions which relate to the exemption clause of the Georgia Railroad & Banking Company, and I claim the application of these statutes equally to both questions involved in this discussion, to-wit:

Taxation of the property, including franchises, of the Georgia Railroad & Banking Company.

Taxation of the excess of the value of the railroad property of that corporation over the par value of its stock.

(a) The Statutes, the Charter and its Amendments.

The essential language in the original charter is this:

"The stock of the said Company and its branches shall be exempt from taxation for and during the term of seven years * * * and after that shall be subject to a tax of one-half (one-half of one) per cent. per annum on the net proceeds of their investments."

The fair meaning of this language is that the capital stock—money, cash at first, but soon converted into tangible property, quickened and vitalized by franchises with which it was born—the stock, the property of this company shall pay no tax. That is to say, that **all** the property which this stock represents, shall be exempt from tax. To introduce into the subject the idea that only a **part** of the property shall be exempt and some other part shall pay, is to do something unexpressed by the language, but, on the contrary, negatived by every reasonable construction of it.

The only tax to be paid by the corporation is an income tax. The Legislature, for reasons satisfactory to it, declared that it would look not to the "investments" of the Company—the property in which its subscribed capital was "invested," and to which the State's gift of franchises imparted life and value, but to the earnings of those investments. The legislative plan made the value of the property a matter of indifference. If being property of less value than the par of its stock—as many times in its history, it has been—but from some fortunate circumstances, it in some one year made net profits, it would pay taxes for that year. If being property of greater value than the par of its stock, it, from poor business conditions, made no net earnings in certain years—and this, too, has happened in its history—it would pay no taxes in those years. This was clearly the legislative intent.

But under the new doctrine contended for it would pay taxes in those years when it made no net earnings; for by an assessment of its tangible property, it could be shown that its value exceeded the par of its stock, and that excess under this new doctrine would be taxed. How the eyes of those legislators of seventy-five years ago would have stood out with astonishment when informed that they had given this old corporation a charter, under which it could be made to pay taxes, whether it made earnings or not!

Not sufficient importance is given by the advocates of the new doctrine to the word "investments" in this tax clause of the charter. What does it mean? What only can it mean? It means this: The Legislature said to the adventurers: "If you will raise $4,000,000 and invest it in this untried experiment of a railroad, we will not tax those investments at all; but if the investments prove profitable, we will take a small percentage of the profits. Your investments may shrink; or by the growth of the country may increase; but be they less or more, we will not tax them. In saying that we shall tax the earnings of your investment, we in effect say that we shall not tax the investments themselves. Circumstances may make your investments increase in value, but they are the same investments, and would be the same if they diminished in value: Of them, for purposes of taxation, we take no account."

While there is no limit put, for the purpose of taxation, on the valuation—diminution or enhancement—of this "stock"—these "investments," there is restriction on the places, purposes and conditions, in which they must exist. They must all be in this chartered railroad whose territorial expansion is rigidly confined. While these investments constitute that railroad in that place, they are not taxable. As soon

as they should change in purpose or in **situs**, the exemption would be lost. And in these limitations is found the State's safeguard against the indefinite increase of non-taxable property.

What has happened in the matter of these investments is that they have increased in value. They might have gone the other way, and may yet do so. There has been no increase of stock of the corporation. Its stock is still invested only in the original railroads and their equipment. Its earnings have paid taxes, been distributed to its stockholders, and have kept up its investments. Wherever any investment of its earnings has been made in other property than the railroad and its appurtenances, such investments are in the nature of surplus and pay taxes.

December 20, 1849, the Legislature passed an Act which, however, was not accepted by the corporation, allowing The Georgia Railroad & Banking Company to increase its stock (See Acts of 1849-50—pages 239-40). The proviso to the third section of this Act is as follows: "**Provided**, that the amount of the increased stock of said company shall not be exempted from taxation as is secured to the present stock of said company by the latter clause of the 15th Section of the Charter of said Company," etc.— A clear declaration, by the legislature of the meaning which that branch of the government put upon this section of the charter.

December 11th, 1858, the Legislature passed an Act which also was not accepted by the corporation (Acts of 1858, page 60), "to authorize The Georgia Railroad & Banking Company, etc., and to increase the stock of said Company for said purpose."

The Act provided that the additional stock under this Act, should be subject to taxation; but it went on to enact that "this reserved right to tax the additional

stock, authorized under this Act, in no case, nor under any circumstances, to be construed to authorize any increase of rate of taxation upon any other stock or property connected with said company other than the additional stock allowed by this Act."

While, under the strict rules of construction applied in such cases, we may not contend that this Act granted anything, we do claim that in it the Legislature of that day declared that the property of the Georgia Railroad & Banking Company was not subject to taxation.

VII.

DECISIONS OF THE COURTS ON THE CHARTER OF THE GEORGIA RAILROAD & BANKING COMPANY.

(b) The scheme of taxation clause of the Charter has been three times before the Supreme Court of Georgia. I have already discussed fully the latest of its decisions; Goldsmith, Comptroller General, vs. The Railroad Company, 62 Ga. 489, in which Judge Bleckley promulgated a startling and previously unheard of formula for the taxation of this company. It may be well to call attention to the fact that the same learned Judge laid down the same rule in reference to the Rome Railroad, whose charter was essentially different from the one under review. The limit on taxation provided by the charter of the Rome Railroad Company was expressly restricted to "the amount of capital stock paid in." 62 Ga. 473-484.

The earliest of the cases was that of the City Council of Augusta vs. The Georgia Railroad & Banking Company, 26 Ga. 651. This case grew out of an effort of the City Council to tax the banking capital of the corporation. The Court held—page 661:

"1st. And we think that it (the tax scheme) means first, that the stock of the company was to be

subject to a tax, but not to any tax exceeding one-half of one per cent. on the net proceeds of its investments. Such we think the natural import of the words; and words, even in the charter of a corporation, conferring valuable franchises, are commonly to be taken according to their natural import. * * * We think that this part of the charter means, secondly, that the stock of the company, as stock—as a unit—is **alone** subject to the tax; not parts of the stock, as the parts used in banking, **nor the particulars in which the stock consists, as the land, cars, rails, etc.**

In the case of the State vs. The Georgia Railroad & Banking Company, 54 Ga. 423—it was held that: "The tax Act of 1874, taxing the railroads of this State **upon the property belonging to them,** as other property of the citizens of this State is taxed, is, so far as the Georgia Railroad is concerned, **as to its railroad and appurtenances,** unconstitutional and void." This should have settled the question, and it would do so but for the fanciful formula unsustained by any authority, and **obiter** even as to the case, set out in Goldsmith, Comptroller General, vs. The Railroad Company, 62 Ga. In this last mentioned case, Judge Bleckley speaks of the decisive case in 54 Ga., just quoted, The State vs. The Georgia Railroad & Banking Company, as dealing with a subject kindred to the taxation of the excess of value of the property over and above the capital stock. The "kindred" here was in a very remote degree, if it existed at all—which we respectfully deny. The so-called "kindred" subject dealt with property of the company **other than its railroad property.** As to **such** property the Court, in 54 Ga., held that there was no exemption. In other words, that case decided two things, to-wit:

1. The railroad investments of the Georgia Railroad & Banking Company are not taxable except by a

levy of one-half of one per cent. of the net earnings of said investments. Besides this decision to this effect, distinctly made in the head-notes of the case, it is said in the body of the decision, on page 427: "The Company is only exempt"—(that is, it is exempt) "on the value of its road and its necessary appurtenances, and these appurtenances must be the ordinary and usual appurtenances of such enterprises." On the same page it is said: "Its (that is, The Georgia Railroad & Banking Company's) tax shall not exceed one-half of one per cent. of its earnings." That is to say, the tax which **this company** shall be called on to pay "shall not exceed," etc.

This case also distinctly holds (see 2d head note) that the thing protected by the company's charter was its "Investments"—not a part of its investments, but the whole. Not its investments up to a valuation equal to the aggregate of the subscriptions to its stock, but its investments resulting from those subscriptions, however those subscriptions may have increased in value or decreased. Indeed, nothing can be plainer than that the Legislature meant that the "investments," the things, in which the capital stock was invested, were not to be the subject of taxation at all; but that the Legislature would look for the State's revenue to a share in the earnings of these investments. The more the earnings, the more valuable the "investments," and the larger the tax; the smaller the earnings, the less valuable the "investments" and the smaller the tax. Thus, the tax received by the State would, in this instance, as in all others, keep pace with the value of the property.

2. The second thing decided by this case was that property of The Georgia Railroad & Banking Company, other than its railroad and proper appurtenances, was taxable.

These two decisions covered the whole ground. That is to say, according to this case, the railroad and all its appurtenances as a railroad are exempt from taxation, for the reason that they are what they are, and without reference to their value. That is to say, the Legislature authorized certain of its citizens to construct a railroad, and promised them that without reference to the value of that railroad, it would not impose a tax (in the language in 26 Ga.) on "the particulars in which the stock consists; as the land, cars, rails, etc."—but would tax only the earnings of the railroad.

The State of Georgia vs. The Georgia Railroad & Banking Company, **supra,** was decided when the question before the court, and the only question was, what property of The Georgia Railroad & Banking Company was taxable. The law, under which this case was tried, was the Act of 1874, which was as searching and sweeping, so far as railroad property is concerned, as any state or constitutional provision of today.

The complainant—Appellee—by an amendment to its original bill, has distinctly pleaded this decision, The State of Georgia vs. The Georgia Railroad & Banking Company, 54 Ga. Rep. 423, as **res judicata—** Deposit Bank vs. Franklin, 191 U. S. 499.

In the case of Goldsmith, Comptroller General, vs. The Rome Railroad Company, 62 Ga. 473, on page 482, Judge Bleckley says that the language granting the Company its partial exemption from taxation was "distressingly loose and ambiguous." Nevertheless, in his opinion sustained by the Court, he was persuaded that the Supreme Court, in passing on this language in 14 Ga. 275, "penetrated to the real truth of the legislative intent."

This—"the real truth of the legislative intent"—is the thing to be sought after, and we firmly believe that any candid mind will reach the conclusion that the "legislative intent" in reference to The Georgia Railroad and Banking Company was to exempt the railroad, represented by its stock, from direct taxation, and to look for the State's revenue to the earnings of the railroad.

Turning to the case of the Rome Railroad vs. The Mayor and Council of Rome, 14 Ga. 275, the case in which the Supreme Court of the State "penetrated to the real truth of the legislative intent," we find that the City Council levied a tax upon the property of the Rome Railroad. Against this tax the Railroad Company interposed a provision of the charter couched in the following "distressingly loose and ambiguous language:" "The stock of said Company shall not be liable to any tax, duty or imposition whatever, unless such, and no more, as is now in Banks of this State."

Upon the issue thus formed the Court held: "The property of the Rome Railroad Company, within the City of Rome, which is necessary to conduct the business of that company is part of its capital stock, and not liable to taxation by that city as property."

This decision was considered and approved in the case of Goldsmith, Comptroller General, vs. The Rome Railroad, 62 Ga. Supra.

When we consider that the Court was willing to grope its way through "distressingly loose and ambiguous language" till it "penetrated to the real truth of the legislative intent," and that this case was thoroughly overhauled in 62 Ga., at a period when a strenuous effort was made by very able counsel in a number of railroad tax cases to subject to taxation property so situated, and on such overhauling it was,

after a re-argument asked for and granted, reaffirmed and approved—this case looms up as a very controlling one in the question now under review.

IX.

It is contended by Respondent that while there is a contract to which the State is a party, the other party is not the corporation—the Appellee—but the shareholders of the corporation.

I would say in reference to this contention:

1. It is a novel view and one not previously taken either by courts or counsel in the forty-six years, in the course of which this clause of Complainant's charter three separate times had focussed upon it the light of most searching investigation.

City Council of Augusta vs. Georgia R. R. & Banking Co., 26 Ga. 651.

The State of Georgia vs. Ga. R. R. & Banking Co., 54 Ga. 423.

Goldsmith, Comptroller General, vs. Ga. R. R. & Banking Co., 62 Ga. 485.

2. The contention seems to be based solely on the use of the personal pronoun "their" in the clause of the charter under review. This pronoun used in the plural, it is contended, necessarily, or at any rate naturally and grammatically, relates to a plural noun, and that noun must be "shareholders." It has been shown, however, by numerous instances in the charter itself, and some of them in this very section, that "their," "they" and "them" relate to the collective noun "Company"—a common usage according to the speech of that day, and not infrequent now.

3. Shares of corporate property have never in Georgia been taxed in the hands of the shareholders. The shares have sometimes been made the measure

of the tax to be paid by the corporation. It would have been very remarkable in the Legislature to carry out its intention of exempting from taxation by excepting something which had never been taxed.

X.

THE MEANING OF THE LEGISLATURE OF 1833 MUST GOVERN THE CASE.

It cannot be too strongly insisted that the inquiry should be: What did the Legislature of that day mean?—and not what different meaning can be extracted by the ingenuity of a later and more grasping age from the language which that Legislature used to convey its full meaning.

Once it is established that the legislature of 1833 intended, for the encouragement of the citizens in embarking in a new and untried enterprise, which, however, promised, if successful, to be of great benefit to the public—as soon as it is established, that for this or any other reason the Legislature intended that that enterprise should bear no burden in the way of taxation other than a small percentage of its earnings, if it made any, there should be an end of the discussion. We venture the opinion that there is no doubt in any candid mind that this was the meaning of the Legislature—that this was the "legislative intent," and that the effort to evolve a different meaning by ingenuity and subtility proceeds not from any uncertainty as to that "intent," but from a "legislative longing to tax railroad property." 62 Ga. 490.

I cannot better conclude this paper than by the following quotation from the opinion of the Supreme Court of the United States, in the case of Wilmington Railroad Company vs. Reid, 13 Wall. 267. Nothing

is needed to make this language directly applicable to this case except to substitute "Georgia" for "North Carolina," and "The Georgia Railroad & Banking Company" for "The Wilmington & Weldon Railroad Company:"

"There is no difficulty whatever in this case. The General Assembly of North Carolina told the Wilmington & Weldon Railroad Company, in language which no one can misunderstand, that if they would complete the work of internal improvement for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation. This is not denied, but it is contended that the subsequent legislation does not impair the obligation of the contract, and this presents the only question in the case. The taxes imposed are upon the franchise, and rolling stock of the Company, and upon lots of land appurtenant to and forming part of the property of the company, and necessary to be used in the successful operation of its business. It certainly requires no argument to show that a railroad corporation cannot perform the function for which it was created without owning rolling stock, and a limited quantity of real estate, and that these are embraced in the general term 'proprty.' Property is a word of large import, and its application to this company included all the real and personal estate required by it for the successful prosecution of its business. If it had appeared that the company had acquired either real or personal estate beyond its legitimate wants, it is very clear that such acquisitions would not be within the protection of the contract. But no such case has arisen, and we are only called upon to decide upon the case made by the record, which shows plainly enough that the company has not undertaken to abuse the favor of the Legislature.

It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the Legislature, therefore, was not inhibited from taxing it. This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, road-bed and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and, therefore, equally within the protection of the charter."

At the risk of repetition and reiteration ad nauseam, I say, finally, that it cannot be too often repeated that the single inquiry in this case is this: What did the Legislature of 1833 mean? And the inquiry is not what the ingenuity of a later age, stimulated by a "legislative longing to tax railroad property," supplemented by a subtlety, strange to our fathers, can evolve from the language which they used to express a single straightforward purpose to encourage adventurers to undertake an experimental enterprise by a pledge of exemption from taxation. As soon as the conclusion is reached that this was the meaning of the legislators of that day, all efforts after a different meaning are simply immoral.

If indeed the interest or the policy of the State of Georgia demands that this limited taxation of The Georgia Railroad and Banking Company, this survival of an earlier industrial and legislative policy shall cease to exist, let the desired change be attained by lawful means. Let not the State resort to unworthy subtlety and ingenuity to find flaws in a char-

ter which has borne the scrutiny of learned and upright judges for 75 years—a charter which the State rejoiced to give as an inducement to patriotic men to venture upon untried enterprises, by which, if successful, the public, which in no event could be a loser, would be enormously benefitted; but which, if unsuccessful, would swallow up the subscriptions of the adventurers. "Adventurers," truly a good name, bestowed in those days upon those who embarked in new and untried enterprises. If this corporation, that has never known the touch of a Receiver, that has never affixed its seal to a mortgage, whose name has been a synonym for honesty and respectability for three quarters of a century, must be stripped now of one of its privileges—if the State of Georgia is bent upon recalling its pristine grant, let it proceed about it openly and honorably, as befits a sovereign, and exercise its unquestioned prerogative of Eminent Domain. While it holds this prerogative it need not stoop to acquire what it covets by means, which are too favorably spoken of when they are characterized as of doubtful propriety.

NOTE: In many parts of this paper, portions of quoted matter are put in **black type.** This **black type** is my own in all cases where it is not stated that it exists in the quoted matter.

JOS. B. CUMMING.

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No. 70.

Supreme Court of the United States

OCTOBER TERM, 1908.

[redacted]

Wm. A. WRIGHT, Comptroller-General of the State of Georgia; THE COUNTY OF WILKES; THE COUNTY OF TALIAFERRO,

Appellants.

vs.

GEORGIA RAILROAD AND BANKING COMPANY,

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR APPELLANTS.

HOOPER ALEXANDER,
OF COUNSEL FOR APPELLANT.

ATLANTA, GA.
CHAS. P. BYRD, STATE PRINTER.
1909.

Supreme Court of the United States

OCTOBER TERM, 1908.

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Wm. A. WRIGHT, Comptroller-General of the State of Georgia; THE COUNTY OF WILKES; THE COUNTY OF TALIAFERRO,

Appellants.

vs.

GEORGIA RAILROAD AND BANKING COMPANY,

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

STATEMENT OF THE CASE.

By an Act of the General Assembly of Georgia, approved December 21st, 1833, and printed in full as "Appendix A" to this brief, the Georgia Railroad Company was incorporated with no limit of time set to its existence.

Georgia Laws 1833, page 256.

By an amendatory Act approved Dec. 18th, 1835, the name was changed to Georgia Railroad & Banking Company.

Georgia Laws 1835, page 180.

The present litigation grows out of, and its determination depends upon, the meaning of the last

sentence of the 15th Section of the Act of 1833, which is in the following words:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax of not exceeding one half per cent. per annum on the net proceeds of their investments."

In 1874 Georgia laid *ad valorem* taxes for the first time on railroad property. The Act of that year laying this tax and providing the machinery therefor is set out in full in "Appendix B" of this brief. It is still of force and is now embraced in the Code of the State with certain amendments.

Georgia Laws 1874, page 107.

Code of 1895, §§ 780-782.

The effort to enforce this tax resulted in litigation by a number of the roads of the State claiming charter exemptions. The more important of these cases were

Central Railway & B. Co. vs. Georgia, 54 Ga. 401.

The Southwestern R. R. Co. vs. Georgia, Ibid.

Georgia vs. Augusta & Savannah R. R. Co., Ibid.

Georgia vs. Ga. R. R. & B. Co., 54 Ga. 423.

Western & Atlantic R. R. Co. vs. Ga., 54 Ga. 428.

Atlantic & Gulf R. R. Co. vs. Ga., 55 Ga. 312.

Savannah, Griffin & N. Ala. R. R. Co. vs. Ga., 55 Ga. 557.

It does not appear that in any of these cases the meaning of the exemption clauses was actually before the court or considered. It was held in the State courts that the Central and Southwestern Companies had lost their exemptions as the result of consolidations, and upon principles similar to what was ruled in this court a few years later in the case of *Maine Central R. R. Co. vs. Maine*, 96 U. S. 499; that prior to these consolidations Section 1682 of the Code, (*Code of 1895*, Sec. 1880) had reserved a right of repeal as to all new charters, in these words:

> "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter";

and that in virtue of this reserved right the companies were bound by the Act of 1874. The cases of the Atlantic & Gulf and of the Savannah, Griffin & North Alabama Companies were held to be controlled by the others.

In the cases of the Augusta & Savannah, and of the Georgia Railroads, it was held that they had never accepted any amendments which would bring them within the operation of the code section quoted.

We can not deny that the decision in the Georgia Railroad case proceeded on the assumption that the language above quoted from the charter exempted its property. Nor can we deny that the State might have made an issue to the contrary.

On the other hand, it is equally beyond dispute that no such issue was made and no such question determined, and that the Georgia Supreme Court did not consciously pass on this matter. At that time the bar had not yet accepted as finally established, the doctrine that it was competent for a Legislature to make a contract exempting from taxation. Members of this court had still from time to time indicated, in dissenting opinions, their unwillingness to accept this view, and the court itself had indicated some doubts on the subject; and it was still hoped by many of the profession that the doctrine would be abandoned. Careful reading of the record shows that the sole issue actually made and passed on was the right of the Legislature to make such bargains.

Mr. Justice McCay held that, under the decision of this court, the contract was irrevocable, and that he was bound to conform thereto, though indicating his personal dissent from the doctrine. Thereupon in 1877, the Georgia Constitution was made to include the following:

> "The right of taxation is a sovereign right, inalienable, indestructible, is the life of the State, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any nor all other departments

of the government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts whatsoever, by said government or any department thereof, to effect any of these purposes, shall be and are hereby declared to be null and void for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract whatsoever by the General Assembly."

Cons't. of Ga., Art. 4, Sec. 1, Par. 1; Code of 1895, § 5796.

The Central and Southwestern cases were brought to this court and reversed, the ruling being that the old charters were not surrendered in the consolidations and that the several exemptions still remained of force, attached respectively to the roads to which they were originally granted.

Central R. R. & B. Co. vs. Georgia, 92 U. S. 665.

Southwestern R. R. vs. Georgia, 92 U. S. 679.

Other phases of the litigation arose subsequently, but the only other case material to the present history of the matter is

Georgia R. R. & B. Co. vs. Goldsmith, 62 Ga. 485.

In the latter case various opinions were expressed as to the correctness and effect of the previous ruling, but the final conclusion was that the whole mat-

ter was then unlawfully in court and its dismissal was ordered. On account of this jurisdictional ruling the appellee has contended, and the circuit Judge ruled in the present cause, that the case in the 62nd Georgia was not binding either as adjudication or precedent.

It does not appear that any other steps were then taken in the matter by either side.

In 1889 and 1890 Acts were passed providing for county and municipal taxation of railroads, the machinery being the same as that of the Act of 1874.

Georgia Laws 1889, page 29.

Georgia Laws 1890, page 152.

The Constitution of Georgia contained the following clause:

> "All taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Cons't. of Ga. Art. 7, Sec. 2, Par. 1; Code, § 5883.

In compliance with this requirement the General Assembly passed an Act in 1902 defining franchises and providing machinery for collecting the usual *ad valorem* tax on them as property; the system provided conforming to that of the Act of 1874. The

first three Sections are printed in "Appendix C" to this brief.

Georgia Laws 1902, page 37.

Thereupon appellant as Comptroller-General demanded *ad valorem* taxes on the franchise as well as on the surplus value of the physical assets of the Company over and beyond the amount of its capital stock, and would have levied process thereon but for the present bill.

The bill makes the issue that the language of the exemption protects the franchise and all the property in which the capital stock was invested, including all increment of value therein, whether unearned or arising from betterments and accumulations through a series of years.

Various questions were made by appropriate pleadings on behalf of the Comptroller-General, but for the special purpose of this brief it is enough to say that the pleadings were apt and the grounds of appeal sufficient for contending here that the language of the exemption never did cover the franchise or any other property of the company, and invoking the judgment of this court on that question.

Appellee, however, by an amendment to the bill, made the issue that, irrespective of the true original import of the charter exemption, the matter is *res judicata*, and the State concluded on this subject by the case referred to in the 54th Georgia. The Circuit Judge so held and that ruling is made one of the grounds of appeal.

OUTLINE OF BRIEF.

This brief is confined to four propositions as follows:

I. Appellee misunderstands the meaning of the charter exemption. It never did relate to any of the corporation property and never was so intended.

II. There never has been any judicial determination to the contrary sufficient in law to conclude that question or prevent an inquiry at the present time into the meaning of the charter.

III. Even were these matters otherwise the franchise is not exempt.

IV. In any event the exemption terminated by its own limitation on or before the 21st of June, 1876.

I.

The charter did not intend an exemption of the corporate property.

As preliminary to an inquiry on this subject, it is pertinent briefly to consider the history of the attitude of this court toward tax exemptions and the rule of construction adopted here.

That it was competent for a Legislature to make a binding contractual exemption as to taxation was first held by this court in 1812.

> *New Jersey vs. Wilson*, 7 Cranch 164.

All the subsequent decisions trace back to this case, though it should not be overlooked that in his dissenting opinion in the *Piqua Bank* case in 1853 Mr. Justice Catron says that no question of irrepealability was in the case or decided.

> *Piqua Bank vs. Knoop*, 16 How. 369; see page 401 of the report.

Wilson's case was one of actual bargain, in which the consideration for the exemption was valuable property received by the State. The *Dartmouth College* case was decided afterwards in 1819,

> *Dartmouth College vs. Woodward*, 4 Wheat. 518,

and established the principle that a charter was a contract; so that when the question came before the

court in *Providence Bank vs. Billings* in 1830, there was no escape from the doctrine established by the joint operation of the *Wilson* case and the *Dartmouth College* case. One had ruled that a contractual exemption was competent, the other that an exemption in a charter was contractual.

But this court held in the *Providence Bank* case, as a matter of construction, that no exemption was granted, and laid down the following rule:

> "We will not say that a State may not relinquish it; (*i. e. the taxing power;*), that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."
>
> *Providence Bank vs. Billings*, 4 Pet. 514.
>
> *Page 561 of the report.*

The rule of construction here laid down has never been modified. Indeed, it has been so often restated, and in language of such increasing emphasis, that it has become elementary. We reproduce here a few of the previous deliverances of this court on the subject merely for convenience of reference.

1853.

> "If they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in

clear and unambiguous language. The authority which this court is bound to exercise in cases of this kind is one of its most delicate and important duties. And if individuals choose to accept a charter in which the words used are susceptible of different meanings—or might have been considered by the representatives of the State as words of legislation only, and subject to future revision and repeal, and not as words of contract—the parties who accept it have no right to call upon this court to exercise its high power over a State upon the doubtful or ambiguous words. * * * * If they come here to claim an exemption from their equal share in the public burdens, or any peculiar exemption or privilege, they must show their title to it—and that title must be shown by plain and unequivocal language."

Ohio Life Ins. & Trust Co. vs. Debolt, 16 How. 416.

See page 436 of the report.

1873.

"But, the point being adjudged, the surrender when claimed must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State.

Minot vs. Phila. Wilm. & Balt. R. R., 85 U. S. (18 Wall) 206.

See page 226 of the report.

1874.

"There is no presumption in its favor. Every reasonable doubt should be resolved against

it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right and narrows a trust created for the good of all."

Tucker vs. Ferguson, 89 U. S. (22 Wall.) 527.

See page 575 of the report.

1875.

"It is a well settled principle that a claim for exemption from taxation can not be supported unless the statute alleged to confer it is so plain as to leave no room for controversy."

Central R. R. & B. Co. vs. Georgia, 92 U. S. (2 Otto) 665.

See page 674 of the report.

1877.

"A well founded doubt is fatal to the claim."

Farrington vs. Tennessee, 95 U. S. (5 Otto) 679.

See page 686 of the report.
1878.

"Exemptions from taxation are never presumed. On the contrary the presumptions are always the other way; and as in this case the capital stock is alone exempt, the property of the company is not to be included in the exemption, unless it manifestly represents the stock, within the meaning of that term as used by the Legislature in the particular Act to be construed. As we said in the case of *R. R. vs. Gaines*, wherever property is exempted by rea-

son of the exemption of capital stock, it is because taking the whole charter together, such appears to have been the intention of the Legislature."

St. Louis, I. M. & So. Rwy. vs. Loftin, 98 U. S. (8 Otto) 559.

See page 564 of the report.

Some of the other cases in which similar expressions have been used are:

Phila. and Wilmington R. R. Co. vs. Maryland, 10 How. 376.

(Page 393 of the report.)

Railroad vs. Board of Supervisors, 93 U. S. 595.

(Page 597 of the report.)

Hoge vs. R. & D. R. R. Co., 99 U. S. 348.

(Page 355 of the report.)

Bank of Commerce vs. Tennessee, 161 U. S. 134.

(Page 146 of the report.)

Bank of Commerce vs. Tennessee, 104 U. S. 493.

(Page 495 of the report.)

Memphis & St. Louis vs. Loftin, 105 U. S. 258.

(Page 261 of the report.)

Phœnix F. & M. Co. vs. Tennessee, 161 U. S. 174.

(Page 177 of the report.)

Central R. R. & B. Co. vs. Wright, 164 U. S. 327.

(Pages 335 and 336 of the report.)

Applying these rules of construction, we submit that upon the face of the charter and without any other light, an exemption of "the stock" does not exempt "the property." But this view is sustained and corroborated in two other ways:

First. Upon the authority of this court's previous construction of similar language in other charters;

Second. From a comparison with other statutes of the State, *in pari materia.*

These will be considered in the order named; and

1. Upon Authority.

This court recognizes as existing in connection with all corporations four separate and distinct elements of taxable value: 1. Franchises; 2. Capital stock in the hands of the corporation; 3. Corporate property, (and by this we take it that the court refers to physical property); 4. Shares of stock in the hands of the corporators.

Tennessee vs. Whitworth, 117 U. S. 129,

substantially to the same effect, see

Farrington vs. Tennessee, 95 U. S. 679.

Powers vs. Detroit G. H. & M. Rwy. Co., 201 U. S. 560.

And it has been frequently asserted that these four are all separate and distinct objects for taxation.

Bank of Commerce vs. Tennessee, 161 U. S. 134.

Shelby Co. vs. Union & Pl. Bk., 161 U. S. 149.

Owensboro Nat'l Bk. vs. Owensboro, 173 U. S. 664.

In Legislative Acts the words "stock," "capital stock," and "capital," are sometimes loosely used. It is not always easy to say whether "capital stock" refers to the shares held by stockholders or to the aggregate capital. In *Whitworth's* case, (117 U. S. 129), cited above, these words were held to mean shares. It is probably safe to say that "capital" will always refer to the aggregate capital, though it is not always clear whether it does or does not include the property purchased therewith. There is at least a strong presumption that the word "stock" refers to the individual holdings. The principles here stated are believed to be sustained by the reasoning in the three following cases:

Farrington vs. Tennessee, 95 U. S. 679.

Memphis & Charleston Rwy. vs. Gaines, 97 U. S. 697.

Tennessee vs. Whitworth, 117 U. S. 129.

In Farrington's case the words "capital stock" were held to mean the individual shares, in the sense referred to in *Van Allen's* case in 3 Wall. 573. It was not however affirmatively stated in the opinion that it did not include also the aggregate capital, though later cases made plain the fact that it did not, as will be hereafter shown. The dissenting opinion plainly rested upon the erroneous understanding that the decision of the court exempted both. Said Mr. Justice Strong:

> "Hence it has been argued that the Legislature had shares in view and from this the further inference is sought to be drawn, that the purpose was to tax alike the corporations and the stockholders, and to exempt both from all other taxation. Such a construction is, however, directly in conflict with the ruling in *The Delaware R. R. tax supra*, (referring to *Minot's* case in 18 Wall. 206) and with the expressed declaration that the company or institution shall pay the tax to the State, which was to be in lieu of other taxation. Besides, the reference to each share of capital stock subscribed is easily accounted for without holding that the shareholder, as well as the companies, were intended to be exempted."
>
> Page 693 of the report.

It is manifest here that Mr. Justice Strong took the ambiguous words "Capital stock" to refer to

the aggregate capital instead of the shares, and understood the decision of the majority to refer it to both. From considerations later to be stated, it is equally clear that the bar and the Tennessee courts fell into the same error. And it is therefore not impossible that the court itself may have written the opinion in the next case on that theory and without clearly stating or noticing the difference.

This was the Gaines case wherein the words "Capital stock" were assumed, (not decided), to refer to the aggregate capital. The question, however, that was really submitted and passed upon in that case was: Assuming the exemption of the capital stock to apply to the aggregate capital, does it or not also exempt the property in which that capital was invested? And the exact ruling was that, while such an exemption may so extend to the property in which the exempt capital is invested, it does not necessarily do so, and that the question is one of intention to be determined from the whole language of the charter, the burden always being on him who claims the exemption. And the decision in *Gaines'* case was afterwards so interpreted by this court in the *Whitworth* case. The same rule also was laid down in *Loftin's* case in 98 U. S. 559.

In the *Whitworth* case the exact thing exempted was again "the capital stock" and the exact question was whether under that language the individual holdings were exempt. It was so ruled.

It is to be noted that, as in *Farrington's* case, there was no question before the court as to whether the

aggregate capital was also exempt. No presumption exists that the court's silence on this subject implies that the capital was exempt. And if there were any doubt on this subject it is settled by a subsequent decision of this court in 1895 in which the decision in *Whitworth's* case was considered, interpreted, and exactly delimited, in the following language:

> "No comfort can be extracted from the remarks of the Chief Justice as even tending to show that the exemption clause covered both the property of the corporation and the shares in the hands of individual shareholders.
>
> We have found no case in this court which is authority for the proposition that language, such as is under consideration in this case, exempts from further taxation, both the capital stock of the corporation and the shares in the hands of individual shareholders."

Shelby Co. vs. Union & Planters' Bk. 161 U. S. 149.

Page 161 of the report.

The foregoing views are fully borne out and sustained by the following cases which constitute the subsequent history of the principles ruled in the *Farrington* case.

Bank of Commerce vs. Tennessee, 161 U. S. 134.

Shelby Co. vs. Union and Planters' Bk., 161 U. S. 149.

Union and Planters' Bk. vs. Memphis, 189 U. S. 71.

From all which we conclude that an exemption of the "stock," even where there is no other evidence as to its meaning, is *a fortiori* to be deemed the shares of stock in the hands of the shareholders.

2. By the internal evidence of the Charter language and by comparison with other statutes in pari materia.

The exemption now considered applies by its terms to "the stock."

In *Whitworth's* case the words "the capital stock" were found and adjudged to mean the individual shares. In arguing out this conclusion from the internal evidence of the language used, this court made certain quotations from the charter then considered, with running comments thereon. We here reproduce the same in parallel column with like quotations from the charter of appellee and like comment.

"Returning to the charter, we find that the capital stock is divided into shares. These shares are to be subscribed and paid for; and the money raised in this way constitutes the capital of the cor-

Turning to the Ga. R. R. Charter we find that the capital stock is divided into shares. These shares are to be subscribed and paid for; and the money raised in this way constitutes the capital of the corpora-

poration spoken of in Section 12, where it is said: "The board of directors shall not exceed in their contracts the amount of the capital of the corporation" etc., and in Section 17, where it is provided that "Said company may at any time increase its capital to a sum sufficient to complete the said road." This capital is to be used by the corporation to build and equip its road; and if more capital is needed for that purpose it may be raised "by opening books for new stock, or by selling such new stock." The manner of doing this may "be prescribed by the stockholders at a general meeting; and any State or any citizen, corporation or company * * * may subscribe for and hold stock in the said company, with all the rights and subject to all the liabilities of any other stockholder."

Sec. 17. Payments of subscriptions are to be made on each share of stock, and if default is made in a payment

tion spoken of in Section 20 where it is said: "and the directors shall not exceed in their contracts the amount of the capital of the corporation" etc.; and in Section 3 where it is provided that "Said company shall be at liberty to enlarge their capital as * * * they may find necessary." This capital is to be used by the corporation to build and equip its road; and the increase may be "either by additional assessments * * * or by opening books, etc., for new subscriptions," (Sec. 3). "so as to make their capital adequate to the works" etc., and also to prescribe the terms and conditions of the new subscriptions. And (Sec. 3) parts of the capital not needed for immediate use may be invested in the public stock of the United States or in bank stock

Sec. 18. Payments of subscriptions are to be made on each share of stock and if default is made in a payment when demanded, "the share or shares on which default shall be

when demanded "the share or shares on which default shall be so made and all payments made thereon" are forfeited "and the same shall vest in and belong to the company." But the board of directors may, if they deem proper, restore them to the "owner or owners," "on payment of all arrears on such shares and the legal interest thereon."

Sec. 15. So too "the stock of said company may be transferred in such manner and form as may be directed by the by-laws of the corporation."

Sec. 16. And under the amending Act of 1848, interest was to be paid semi-annually at the rate of six per cent. per annum" to the several stockholders thereof * * * * on the capital stock of said company actually paid."

so made and all payments made thereon" are forfeited "and the same shall vest in and belong to the company" and may be appropriated as they shall see fit.

Sec. 1. "Provided the amount of stock subscribed will warrant, etc."

Sec. 5. "So that on summing up * * * * it may appear whether the stock is filled up or falls short of the aforesaid capital."

Sec. 5. "Each subscriber may be entitled to a number of votes equal to the number of shares he holds in the stock of the company."

Sec. 15. Provided that the subscription of stock or shares etc. shall be filled up, etc."

But this parallelism may be a mere *ad captandum* quip, a mere trick of words. The real internal argument from the charter is much stronger, as will appear from the following excerpts:

Section 3 provides that

> "The stock of the company" * * * "shall consist of 15,000 shares * * * and the said company to be formed on that capital"

and therefore, not only defines the identical words that were used in the exempting clause, but contrasts them with "the capital," which is the company's property.

In the very Section (15) in which "the stock of the company" is exempted from taxation, there is a proviso

> "that the subscription of "stock or shares of said company" to the amount etc. shall be filled up etc.,"

thus, in effect, again defining the term as equivalent to "the shares of the company."

And so, in general, leaving out all references which are at all ambiguous, wherever in this charter the property is spoken of as referring to the individual holdings it is called "stock," and wherever it is spoken of as aggregate it is called "capital."

In the 19th Section there is authority to the company to increase its "capital," while in the 18th, the provision in reference to the subscribers called them "holders of stock."

Perhaps the clearest indication of what was in the legislative mind is in Section 5, where, in order to determine the priorities of the several subscriptions, directions are given to show the dates thereof, "so

that on summing up the whole it may appear whether "the stock" is filled up or falls short of the required "capital."

It seems reasonable to believe that, if the draftsman of this Act had desired to select words apt for distinguishing between the individual holdings on the one hand, and the aggregate capital of the corporation on the other, he would have used the word "capital" for the latter and "stock" or "shares" for the former. The facts quoted demonstrate that that exact purpose was in mind, since that exact thing was done.

So much for the internal evidence of the Act itself. It is corroborated by contemporaneous legislation *in pari materia*.

This court has said that

> "Legislative contracts should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made.
>
> *M. & O. R. R. Co. vs. Tennessee*, 153 U. S. 486.

The year 1833 was the beginning of the railroad era in Georgia. Railroads were then in their infancy everywhere. As will be shown later, there was one earlier charter in Georgia, but the first three railroads ever built in that State were chartered in 1833, the Georgia R. R., the Central Railroad, and the Monroe Railroad. The Central was

chartered contemporaneously with the appellee, and it also was granted an exemption which we here reproduce beside that of the appellee, for comparison.

The Central.	*The Georgia.*
"That the said canal or railway, and the appurtenances of the same shall not be subject to be taxed higher than one-half per cent. upon its annual net income." *Georgia Laws 1833,* page 248.	"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said roads or any of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

The writer of this brief was not inclined in the beginning to attach any peculiar significance to the the use of the word "their," but in the foregoing comparison the contrast with the word "its" in the Central charter can not fail to attract attention. In *Gordon's* case in 3d How. 133 the court seems to have laid some stress on the word "them" as indicating a reference to the stockholders. The discussion of the pronoun is on page 148 of the report.

But, whatever may be true as to the significance of such individual verbal differences, the contrast between the substance of these clauses is certainly entitled to very great weight.

We are not blind to the possible contention that a conclusion can or should be drawn from this difference of verbiage, quite the contrary to what we have drawn; or it may even be insisted that the difference was unintentional. But in either case the doubt is fatal to the exemption.

Farrington's Case, 95 U. S. 679.

Moreover there is additional evidence. Both these charters were amended in 1835. The amendment of the Central's charter increased its capital in Section 2 to three and a half millions, and in Section 18 altered the provisions as to the exemption. We reproduce the old exemption here in parallel column with the new.

Central Exemption. 1833.	Central Exemption. 1835.
"That the said canal or railway and the appurtenances of the same shall not be subjected to be taxed higher than one-half per cent. upon its annual net income."	"That the said railroad and the appurtenances of the same shall not be taxed higher than one-half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of the said company within the jurisdiction of said corporation in the ratio of taxation of like property. *Georgia Laws 1835*, page 227.

The section increasing the capital further emphasizes the distinction:

> "The stock of the company shall consist of three millions of dollars, in share of one hundred dollars each, and that the said company shall be formed on that capital."

Georgia Laws 1835, page 218.

The Georgia Railroad charter was also amended in 1835 and its capital stock increased.

Georgia Laws 1835, pages 180 and 199.

There was no change made in its exemption by the amending Act, though it is manifest from the change in the Central charter that the distinction between taxing the stock and taxing the property was definitely in the legislative mind at the time, the State being allowed to tax the Central stock but not its property, and the municipal corporations allowed to tax the property and not the stock.

If the peculiar Georgia Railroad exemption of 1833 had been accidental or unintentional it would have been altered in the amendment of 1835 so as to conform to the intention.

In a very similar case, and in a very similar particular, this court said that a State is presumed to know the condition of its own legislation in such matters.

Piqua Bank vs. Knoop, 16 How. 369.

Page 383 of the report.

Recurring again to the legislation of 1833, if the different language used is to be regarded as purposely different, there is no alternative but to regard the two charters as exempting different things. It being certain then that the Central charter exempted its property, it is equally certain that the Georgia charter did not.

There is, however, still further evidence that the difference was intentional. Another railroad was chartered in 1833, the Monroe Railroad, and the fact that it was to begin where the Central was to end suggests that it was expected to be an extension of the former. It was granted no exemption at all.

Georgia Laws 1833, page 238.

It was in fact ultimately consolidated with the Central and this court passed on its right to exemption after the consolidation.

Georgia Laws 1847, page 181.

Central R. R. vs. Georgia, 92 U. S. 665.

If it could be fairly argued that the Legislature intended to give the same exemption to the Georgia that it gave to the Central, the argument would necessarily rest on the premise that it was intended to treat all railroads alike. The entire failure to grant any exemption to the Monroe Railroad negatives the premise and therefore the argument.

The original charter of the Augusta & Savannah Railroad, (1838), made the same distinction as the

Central amendment of 1835 between "stock" and property, the 13th Section being in these words:

> "That the said rail road and the property of the said company shall not be subject to be taxed higher than one-half of one per centum on its annual income; and no city or town corporation shall have power to tax the stock of said company, but may tax the property, real or personal, of said company, within the jurisdiction of said city or town, in the same ratio of taxation of like property."

Georgia Laws 1838, page 179.

The word "income," here used, has been construed in Georgia to mean the gross income.

Goldsmith vs. Aug. & Sav. R. R. Co., 62 Ga. 468.

At the same term of the Legislature The Louisville R. R. Co. was granted a like rate on its *net* income.

Georgia Laws 1838, page 171.

While still another, The Talbotton Rail Road Co. received an exemption in the same terms as was granted the Augusta & Waynesboro supra.

Georgia Laws 1838, page 185.

The Augusta & Eatonton Turnpike Charter.

There was precedent legislation which throws even a brighter light on the Georgia Railroad charter than

the contemporary and subsequent enactments above referred to.

Steam traction by rail was first made successful during the period from 1825 to 1830, in England in the Stockton & Darlington and the Liverpool & Manchester Railroads. South Carolina was first in America to adopt the new system. The South Carolina Road running from Charleston to Augusta, (Hamburg), was chartered in 1827 and was in operation in 1831. Its history is partially set forth in

Tomlinson vs. Branch, 82 U. S. 460.

Branch vs. Charleston, 92 U. S. 677.

From the former of these it will appear that South Carolina granted that company an exemption in 1827 in the following language:

> "That during the first period of thirty-six years the stock of the company, and the real estate that may be purchased by them and connected with and subservient to the works herein authorized, shall be exempted from taxation."
>
> *Page 462 of the report.*

Augusta was at that time the interior commercial metropolis for upper Carolina and fully half of Georgia. Savannah and Charleston were rival ports and both communicated with the interior through Augusta. The anxious desire of the whole State to facilitate travel to this interior *entrepot* is reflected in a great deal of legislation. Specimens of this may

be seen in the Acts creating Turnpike Companies about 1822, running from Augusta to the various points subsequently aimed at by the Georgia Railroad.

> *The Washington Turnpike Co.*, Georgia Laws of 1821, page 63.
>
> *The Milledgeville, Eatonton and Greensboro Companies*, Georgia Laws 1822, page 86.

These turnpike companies were abortive. The successful opening of the South Carolina Road, however, stimulated anew the necessity and desire for an improved highway to connect with it and extend into the cotton growing region.

The consequence was that in 1831 the Legislature enacted a charter for "*The Augusta and Eatonton Turnpike and Railroad Co.*"

> *Georgia Laws 1831*, page 187.

This Act is considered of sufficient importance in the present case to warrant its reproduction in full in "Appendix D."

In Section 2 it provides

> "That the stock of the company * * shall consist of ten thousand shares, of one hundred dollars each, and the said company to be formed on that capital."

In Section 9 authority was granted to buy and hold property of various kinds as subservient to and a site for the proposed road and to erect various

structures thereon, and thereupon in Section 14 it was provided:

> "That the right to make, use and keep up the railroad or turnpikes and transportations thereby authorized by this Act, shall be vested in said company, its representatives and assigns forever, and that during the first period of ten years, the stock of said company and the real estate which may be purchased by them, and connected with and subservient to the works herein authorized shall be exempt from taxation."

The facts, and the phrases used, may fairly be regarded as showing not only the legislative knowledge of and familiarity with the South Carolina charter, but that the distinction between "the stock" and "the real estate," or other property, was definitely in the legislative mind. It is a fair argument. Compare also the exemption in the *Whitworth* case where "the capital stock" was exempt forever and the property for 20 years.

This charter is important as a statute *in pari materia* with the Georgia charter; but it is also important in a far more serious particular than that. Reference to the title of the Georgia Railroad charter and to Section 23 thereof, in both of which the charter of the Augusta & Eatonton Turnpike & Railroad Company is affirmatively repealed, as well as a great deal more of the internal evidence, shows that the one was evolved from the other and substituted for it.

Comparison of the provisions of the two charters suggests many reasons why the first was inadequate and unsatisfactory. Section 23 of the Turnpike charter, for instance, was clearly designed to meet the *Dartmouth College* ruling, and was of course unsatisfactory to the corporators for that reason.

The Legislature yielded to the objections made, and in the new charter gave up this important reservation of the right to repeal and amend, and made the charter perpetual and irrevocable; but, as an offset, made two important modifications. In Section 15 it restricted the special privileges to a term of 36 years, as the South Carolina Charter had done,

see in this connection, *Ga. R. R. & B. Co. vs. Smith, Govr.*, 128 U. S. 174,

and in the same Section struck out all property exemption and reduced the stock exemption from a total to a partial immunity, though, by way of compromise, the partial exemption on the stock was no longer limited to ten years as it had been in the Turnpike charter.

The legal significance of a change of verbiage like this is patent. But we are not left to argument about it. This court has said of such a change:

> "It is the settled doctrine of this court that an immunity from taxation by a State will not be recognized unless granted in terms too plain to be mistaken. In leaving out a word which, if used, would be regarded as specially and particularly including an exemption from taxation

granted to another company, it seems to us that a very grave doubt is cast upon the title of the plaintiff in error to the exemption claimed, and in such case the existence of a well founded doubt is equivalent to a denial of the claim."

Phoenix Fire & Marine Ins. Co. vs. Tennessee, 161 U. S. 174.

Pages 177 and 178 of the report.

Other Legislative and Historical Light.

Entire familiarity with a past Legislative policy, such as this court has said is necessary in order to interpret legislative contracts,

(See *B. & O. R. R. vs. Tennessee*, 153 U. S. 486)

involves intimate acquaintance with a long list of public and private acts which, separately and in themselves, are comparatively unimportant, and with the details and forms of expression therein,—things which can not even be formulated, far less proven. The very weight of such a mass precludes our presenting it here, although it would be in high degree illuminative.

Nevertheless a specimen line of evidence running through the statutes can be here set out to advantage. It lies in the evolution of the Georgia Tax Laws.

The first of these after the Revolution, in the first Section levied a specific tax of a quarter of a dollar

on every 100 acres of land, and the same amount on every slave and on every town lot, a poll tax of one dollar on every free negro and two dollars on every male adult not pursuing a lawful profession or mechanical trade, and not cultivating five acres of land.

Tax Act for 1783, Marbury & Crawford's Digest, page 447.

The next Act elaborately classified and valued all the lands of the State, and levied an *ad valorem* tax of ⅓ of 1 per cent. thereon and in the second section levied taxes as follows:

"That the sum of four shillings and eightpence shall be levied on all free male white persons from the age of twenty-one years and upwards, who are entitled to vote at elections in this State, and the sum of two shillings and fourpence on all negroes and other slaves whatsoever, within the limits of the same, and the sum of four shillings for every one hundred pounds value of every lot, wharf or other lands, and on all buildings within the limits of any town, village or borough in this State, and the sum of nine shillings and fourpence upon every four-wheeled, and the sum of four shillings and eightpence upon every two-wheeled carriage, except waggons, carts and drays, and the sum of one pound one shilling and ninepence upon all free negroes, mulattoes, and mustizoes, from twenty-one to fifty years of age, over and above any taxable property they may be possessed of, and four shillings for every one hundred pounds upon every persons stock in trade of persons in trade, shopkeepers and others, to be given in upon oath, and the sum of one pound one shilling and ninepence on every practitioner of

physic and law, and the sum of one pound one shilling on all factors, brokers and vendue masters throughout the State."

Tax Act for 1785, Marb. & Crawford, Dig. 454.

This act is set out to show the narrow but enlarging limits of the subjects of taxation prior to the gradually evolving notion of the taxability of intangibles.

With minor changes gradually added, it continued the basis of taxation many years. In 1796 the first effort was made to reach intangible assets in the form of a tax on the shares of stock in the Bank of the United States, to be given in and paid by the holders: The second section is here reproduced in full showing the exact language and the context.

"That the sum of thirty-seven and a half cents shall be levied on all free male white persons of the age of twenty-one years and upwards in this State and the sum of thirty-seven and a half cents on all negroes and other slaves whatever under the age of sixty within the limits of the same; and the sum of forty cents for every hundred dollars value of every lot, wharf, or other lands not herein already enumerated, and on all buildings within the limits of any town, village or borough within the same, the sum of fifty cents upon all male free negroes, mulattoes, and mustizoes, from the age of twenty-one and upwards, over and above the taxable property they may be possessed of; that the sum of twenty cents shall be levied for every hundred dollars value of all persons stock in trade, shopkeepers and others, and to be computed at prime cost, and the return to be made on oath that the stock in trade so returned is the highest estima-

tion of the stock in such person's possession, at any time not exceeding three months preceding the time appointed by this law for such stock in trade to be estimated and returned; the sum of four dollars on all professors of law or physic, and the sum of fifty dollars on all billiard tables, and the sum of four dollars on all factors and brokers; and on all foreign wares, liquors, and merchandise, sold, bargained, or trafficked for, by all such factors and brokers, the sum of eighteen and three-quarter cents on every hundred dollars, by them so sold or disposed of, to be given in upon oath, *and the sum of fifty cents upon every hundred dollars of the funded stock of the United States to be given in by the holders thereof in like manner as such stock in trade*. Provided, nevertheless, That in all cases of extreme indigence or infirmity the inferior court of each county shall be and they are hereby authorized to remit the poll tax upon such indigent or infirm persons claiming the same."

Tax Act for 1796, Marb. & Crawford Dig. 505.

The possibility that the words "funded stock" may refer to some form of the public debt has not escaped attention, but the writer is convinced that he is correct in assuming that it refers to shares in the bank. Further reference to this phase of the question is made in a short appendix (E) to this brief.

This tax was renewed annually for some years and until the form of it was changed, as will be shown later. In 1801 a new element of intangible values was aimed at in a graduated tax on lawsuits, which was continued for some years.

Tax Act for 1801, M. & B. Dig. 541.

These taxes continued to be re-enacted with no important changes from year to year.

Tax Act for 1802, Clayton's Dig. page 42.

Tax Act for 1803, Clayton's Dig. page 86.

Tax Act for 1804, Clayton's Dig. page 158.

until the act of Dec. 4th, 1805, when the bank tax was suddenly shifted from the very reasonable exaction of $\frac{1}{2}$ of 1 per cent. on the stock, "to be given in by the holders thereof," and made $2\frac{1}{2}$ per cent. on the capital to be returned and paid by the corporation, besides a further tax on the circulation. The section is as follows:

> "That there shall be a tax of two and an half per cent. levied and collected *on the amount of capital of any bank or banks*, office or offices of discount and deposit within this State, and the further sum of one-half per cent. on the amount of bills issued from any such bank or office of discount and deposit, over and above the amount of capital as aforesaid, *which shall be returned on oath by the cashier or directors thereof*, and collected and paid into the treasury of this State, by the tax collector of the county in which such bank or office of discount and deposit is or may be established, in the same manner as pointed out in and by the aforesaid act, and if the cashier or directors of any such bank or office of discount and deposit shall neglect or refuse to give in the amount of capital, or bills as aforesaid, it shall be the duty of the receiver of tax returns and the collector of taxes, to proceed against such cashier or directors in the same manner as against those in default, or who have neglected or refused to return the amount of taxable property by him, her or them claimed, and if no

property can be found belonging to the proprietors or share holders of such bank or office of discount and deposit, whereof the amount of tax can be levied as returned by the cashier or directors, or assessed by the receiver of tax returns in case of default, the cashier and directors of such bank or office of discount and deposit are hereby declared and made liable and answerable in their own private capacity, and the tax collector is hereby authorized and required immediately to proceed by levy and sale, as pointed out by the aforesaid act, against the private property of such cashier and directors, until the whole amount is collected."

Tax Act for 1806, Clayton Dig. 254.

This tax was reduced the next year to 5/16 of 1 per cent. in the words following:

"That the tax imposed by the aforesaid act, upon the branch bank of the United States, at Savannah, be reduced to thirty-one and a quarter cents, per hundred dollars, *upon the amount of capital of said bank*, on the first day of January last."

Act of June 26, 1806, Clayton's Dig. 301.

The Tax Act for 1806, by its own terms, was to remain of force until repealed, and the amendment last quoted was continued of force for 1807 by the appropriation act in 1806.

Clayton's Digest, Page 359, Sec. 6.

By the act of Dec. 5, 1807, *The Planter's Bank of the State of Georgia* was incorporated for 30 years with an authorized capital of one million dollars of which it was reserved in Section 11 that at any time

within five years the State might become a subscriber for as much as one thousand shares. This was at that time the only State bank in Georgia.

See Clayton's Digest, Page 374.

No tax exemption was granted this bank in its charter, but three days later the tax act for 1808 was approved, which in terms again continued in force until repealed, the tax Act passed in 1805 for the year 1806, and, in the 4th section, re-enacted and continued in force the amendment of 1806 reducing the tax on banking capital from 2½ per cent. to 5/16 of one per cent, *but expressly excepted the Planter's Bank from the operation of the tax.*

See Tax Act for 1808, Clayton's Dig. Page 392.

This Planter's Bank charter appears for some reason to have been unsatisfactory to the corporators and it does not appear to have been organized at that time. In 1810 the charter was repealed and a new charter enacted with a capital of $1,000,000 whereof 1000 shares were again reserved to the State.

Clayton's Digest, Page 632.

In 1811 an extensive amendment was passed to this charter whereof the 2d section was as follows:

> "That the *capital stock* of the said bank, and every other property real or personal, which it may hereafter acquire and hold, shall be subject to a taxation not exceeding the ratio of other taxable property in this State; Provided, the corporation of the city of Savannah shall not

have the power to tax said *bank stock, but may tax any property*, real or personal, which said bank may acquire, in the ratio of taxation against the like property in the said city."

Lamar's Digest, Page 74.

As again illustrating the legislative selection of different words to designate the aggregate capital and the separate shares, the 1st section of this amendment provides that

> "The capital stock of the said bank shall be one million dollars to be divided into ten thousand shares, etc.,"

while the 5th section, which deals with the stock from the view point of the shareholder, provides that

> "the stock which shall remain unsubscribed for or the installments which shall remain unpaid on the day appointed for the election of directors, such stock shall thereafter be disposed of etc., etc., as shall be ordered and published by the said Directors."

During the period 1810-1818, inclusive, four banks were chartered by the State as follows:

1810—The Planter's Bank. Clayton's Dig. 632.

1810—The Bank of Augusta. Ibid 588.

1815—The Bank of the State of Georgia. Lamar's Dig. 85.

1818—The Bank of Darien. Ibid 94.

The State was a stockholder in all of them, a fact which is recited in the Central Bank Charter:

Georgia Laws 1828, page 34.

The total amount of the State's holdings in these banks was $1,005,000.00.

No other bank was chartered prior to 1821.

In 1821 the Tax Act for 1822 repealed the tax on the aggregate capital of the Bank of the United States and restored the tax on the individual shares as it was from 1796 to 1804. The language was as follows:

> "And be it further enacted by the authority aforesaid, That the like sum of thirty-one and a quarter cents shall be levied and collected, after the first day of January next, upon every hundred dollars value of stock, owned by any individual of this State, in the Bank of the United States: Provided, nothing herein shall be so construed as to require the auctioneers of Darien and St. Marys' to pay more than twenty-five dollars.
>
> And be it further enacted by the authority aforesaid, That so much of this Act as relates to taxing the capital stock of the Office of Discount and Deposit of the Bank of the United States, passed the 19th December, 1817, be and the same is repealed."
>
> Georgia Laws 1821, page 88.

This system of taxing the individual shares continued to be annually re-enacted until after the Georgia Railroad was chartered. And the fact that this company itself contemplated banking appears from the 3d section of the charter, wherein banking powers were partially granted, which were made full banking powers by the amendment of 1835.

From the legislation cited and the legislative history set out in the foregoing pages we submit to the court that it is demonstrated that the Legislature of Georgia had definitely in mind at all times from 1796 to 1838, inclusive, the distinction between taxing the individual holdings of stock and taxing the aggregate capital of the corporation, as well as the difference between taxing either of them and taxing the corporate property, and that it was particularly in mind in 1831 and 1833 when the two charters of this company were enacted, and that language was carefully selected in the present charter which, under the decisions of this court, was apt for excluding any conclusion that the property or any of it was exempt.

II.

Nor has there ever been any conclusive adjudication of the question, sufficient in law to prevent the State from denying the exemption claimed and invoking a judicial decision at this time.

Appellee's reliance in support of its plea of *res judicata* is on the case of *Georgia vs. Georgia R. R. & B. Co.*, 54 Ga., 423.

Reference to that case shows that it was neither morally nor technically a judgment as to the meaning and effect of the charter language. It was assumed in the case that the language had the effect to exempt the property, just as it was in The *Gaines* case, and the real question litigated and determined, and the only question, was as to the inviolability of such a contract.

Even in those jurisdictions where a judgment as to taxes is forever conclusive, as well on all questions which might have been presented and decided, as on those which were, such a judgment is conclusive only in cases identical with the one relied on.

> "When the second suit is upon a different cause of action, though between the same parties, the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined."
>
> *Nesbit vs. The Riverside District*, 144 U. S. 610.

To the same effect are:

Cromwell vs. Sac County, 94 U. S. 351.

Wilmington & Weldon vs. Alsobrook, 146 U. S 279.

Keokuk & Western R. R. vs. Missouri, 152 U. S. 301.

The case last above cited is exactly in point, because the exemption appears to have been conceded in the case relied on as *res judicata*, to inure to the second company, and therefore was not the issue passed upon, though clearly it might have been.

But in Georgia a judgment in a tax case is not an estoppel at all, except as to the taxes for the year concerning which the judgment was rendered. And the fact is not without weight that this rule was enunciated by the Georgia court after very deliberate consideration of the whole subject and at the instance of this very appellee and in a case where the adversary party was this same appellant.

Georgia R. R. & B. Co. vs. Wright, 124 Ga. 596.

Such a rule in any State as to the legal force and effect of the judgments of its own courts is recognized as binding upon this court.

Union & Planter's Bk. vs. Memphis, 189 U. S. 71.

It does not even raise a federal question so as to give jurisdiction.

Phoenix F. & M. Co. vs. Tennessee, 161 U. S. 174.

In *Farrington's* case this court held that certain language in the bank charter, similar to that now considered, exempted the shares in the hands of Farrington.

No other question was before the court, and, read in the light of later decisions, nothing else was determined. But the language of Mr. Justice Swayne in delivering the opinion, and particularly what he said on pages 688 and 689 of the report (95 U. S., page 688) naturally left the impression on the mind of casual readers that the court considered the whole property exempt.

This impression was strengthened by a decision on the same language some years later in 1881, in which it was held that even where an exemption of the aggregate capital might, if so intended, apply to the property in which that capital was invested it would not apply to property disconnected with the company's business.

Bank of Commerce vs. Tennessee, 104 U. S. 493.

And although this impression was definitely corrected in the cases in the 161st, yet, even after that, this court itself, in 1896, used language, *arguendo*,

indicating an impression that the case in the 104th held the exemption to apply to the property.

Central R. R. & B. Co. vs. Wright, 164th U. S. 327. Page 335 of the report.

But in 1895 this court had before it a case in which the Supreme Court of Tennessee had held on the supposed authority of the *Farrington* case that the capital and the property were both exempt, and the awkward anomaly was presented that the mistake of the Tennessee Court as to what this court meant could not be corrected here because the federal question was decided in favor of the Bank, thus preventing any jurisdiction for review.

Bank of Commerce vs. Tennessee, 161 U. S. 134.

Fortunately for the accuracy of the legal precedents, another case was here at the same time from the Circuit Court of the United States, involving identically the same questions, and there this court did have jurisdiction and carefully reviewed the whole history of the matter and pointed out the error.

Shelby Co. vs. Union & Planter's Bank, 161 U. S. 149.

In this way the situation resulted that the Tennessee Courts had adjudicated in favor of an exemption which did not exist, and had the principles of *res judicata* existed, as now claimed by appellee, Tennessee would have had no redress. In settling

that question, the one now being considered was settled in the same case exactly as we claim it.

Union & Planters Bk. vs. Memphis, 189 U. S. 71.

But even though this rule were otherwise, and even if the Georgia Court had consciously passed upon the meaning of the exemption clause and deliberately held that it exempted the property of the corporation, which we submit in fairness that it never did, the established doctrines of this court make it plain that in this jurisdiction it is still competent to make an original inquiry.

For it must be observed that the case comes within the scope of the judicial power of the United States upon the sole ground that Georgia is here alleged to have attempted by statute to impair the obligation of a contract. If Georgia is not doing that, there is no jurisdiction here.

And while this court usually accepts the interpretation put upon State statutes by its own courts, it has long been settled that where the existence or effect of a contract is in question, this court must and will decide these matters and interpret the alleged contract for itself:

L. & T. Co. vs. Debolt, 16 How. 416.

Jefferson Branch Bank vs. Skelly, 1 Black 436.

And while it was once contended that this rule applied only where the decision of the State Court

was adverse to the contentions of him invoking the federal jurisdiction, it is now established that upon this question the federal courts will, if necessary, depart from the interpretations of the State judiciary, as well in order to sustain the later law where it does not infringe upon the Constitution, as to avoid it when it does. And the case so holding was in all respects parallel to this one.

Louisville & Nashville R. R. Co. vs. Palmes,
109 U. S. 244.

III.

In no case could the franchise be exempt.

The authorities already cited are believed to establish the fact that an exemption of "stock," meaning thereby the individual holdings, is a privilege granted to the shareholder, and never inures to the benefit of the corporation or exempts any of its property.

It may be conceded that an exemption of the "capital" or "capital stock," meaning thereby the aggregate capital of the corporation, may in some cases extend to and protect the property in which the capital was invested.

But, even if the word "stock" in this charter were held to mean the aggregate capital, the presumption is that a tax on the capital of a corporation does not exempt the property into which it passes, and before it will be held so to do, it must affirmatively appear that such was the legislative intent.

M. & C. R. R. Co. vs. Gaines, 97 U. S. 697.

Tennessee vs. Whitworth, 117 U. S. 129.

St. L., I. M. & So. Rwy. Co. vs. Liftin, 98 U. S. 559. See page 564 of the report.

If property in which the exempt capital was invested be not covered by the capital exemption, *a fortiori* the franchise, which was a gift, would not be exempt.

This does not of course conflict with the proposition that an exemption of "the property" covers the franchise.

Wilmington & Weldon R. R. Co. vs Reid, 80 U. S. 264.

Because the franchise is included in the word "property."

IV.

Whatever may have been the meaning of the exemption it was to terminate by its own limitation after 36 years.

The clause under consideration exempted the stock from taxation entirely for seven years and directed that "*after that*" it was to be taxed at the limited rate.

We think the words are not synonymous with "thereafter" but mean "after that for the remainder of the 36 years." Without the context they might mean "forever," but the history of the matter and the context seem to exclude this meaning.

Both the Augusta & Eatonton Turnpike Charter and the Georgia Railroad Charter manifestly contemplated the possibility that the corporations might desire merely turnpike rights, franchises of way and not of carriage.

Section 1 of the former and section 22 of the latter expressly permitted both companies to build turnpikes instead of railroads.

Turnpike franchises of way, collecting tolls for use of the road, had been common in Georgia as elsewhere. Franchises of carriage by land had before that been granted in Georgia as elsewhere to stage coaches, sometimes being exclusive as to the right to use particular highways. Specimens of these are

(Turnpike.) *Clayton's Dig.* 145. (1803).
(Stage). *Ib.* 54. (1802).
(Do). *Ib.* 200. (1804).

We know of no case prior to 1831 where the two franchises of way and carriage were united in one company, except in water carriage by canal.

In both these charters, the franchise to be and the franchise to take tolls of passers, were absolute. In Section 10 of the Charter of 1831 and in Section 12 of the Charter of 1833 the franchise of carriage was added, to be exclusive on the roads to be built by them, "while they see fit to exercise the exclusive right."

By the same sections, they were respectively authorized, to farm out this super-added and optional franchise of carriage, in which event the lessee, and not the corporation, would "be regarded as common carriers"; or they might, by the 13th section of the charter of 1831 and the 14th section of the charter of 1833, abandon the franchise of carriage altogether, and "open the said rail road or turnpike or any part thereof to public use"; in which event they would, of course, like any other turnpike company, simply take tolls for the use of the "way."

The character and history of this sort of grant, in the case of this Company and others, and its meaning and limitations, were considered and explained by this court in

Ga. R. R. & B. Co. vs. Smith, Gov'r., 128 U. S. 174.

and *Lake Superior Etc. R. R. vs. U. S.*, 93 U. S. 442.

Attention has been called in an earlier portion of this brief, (page 29 supra), to the influence of the charter of the South Carolina Rail Road of 1827 on the language and provisions of these Georgia charters. Reference thereto shows that by the terms of the Carolina charter the stock and the real estate of that company were to be exempt from taxation "*during the first period of thirty-six years,*" which was the same period to which that road had its special and exclusive powers limited.

There was no such limit in the Georgia charter of 1831. *Per contra* by the 14th section it was expressly provided that the right to make *use* and keep up, etc., was to vest in the company "*forever,*" and that the tax exemption on the stock and real estate should continue for ten years.

The corresponding section of the new charter (15) returned to the South Carolina policy, and limited the special rights of use, etc., to thirty-six years from the completion of the road, allowing six months for securing subscriptions to 5,000 shares and six years more for finishing the work, which would put June 21, 1876, as the ultimate limit to the special privileges. In the same section it was provided that the stock should be exempt from taxes for seven years, and taxable at the prescribed rate "after that."

We think this clearly meant that the tax privilege was to cease as it did on the Carolina road in thirty-six years, and that if it had been intended to make the exemption "*forever*" the legislature would have

said so, and that under the dictum of the Chief Justice, quoted *supra* (page 10) from *Debolt's* case, it was the duty of the corporation to see that the grant was made "in clear and unambiguous language."

> "If they come here to claim an exemption from their equal share in the public burdens, or any peculiar exemption or privilege, they must show their title to it—and that title must be shown in plain and unequivocal language."
>
> *Debolt's case*, 16 How. 436.

We do not mean to rest this contention merely on a doubt. We think the facts stated clearly demonstrate that our theory is correct. And it is fortified by another provision in the 15th section, from which it is apparent that the whole grant was experimental and contemplated further action after the 36 years. Whether a monopoly of carriage would be feasible or necessary was uncertain. Therefore the limit to 36 years, and the provision that even if the Legislature should not renew the grant, the company should still retain its franchise to be, and that the Legislature might then extend the exclusive rights "upon such terms as may be prescribed by law."

And if it was thus deemed necessary by the Legislature to affirmatively declare that the company, even after the thirty-six years, should still retain its existence and its other "*privileges*," the declaration to that effect necessarily excludes any presumption that it was also to retain its "*immunities*."

> *Memphis & Charleston vs. Gaines*, 97 U. S. 697.

Home Ins & Trust Co. vs. Tennessee, 161 U. S. 198.

Phoenix F. & M. Co. vs. Tennessee, 161 U. S. 174.

Corporations take only by express grant.

Charles River Bridge Co. case, 11 Pet. 420.

Providence Bank vs. Billings, 4 Pet. 514.

"Exemptions from taxation are never presumed. On the contrary the presumptions are always the other way."

St. L. I. M. & So. vs. Loftin, 98 U. S. 564.

"Where it exists, it is to be rigidly scrutinized and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require."

Tucker vs. Ferguson, 89 U. S. 575.

"The surrender must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arises as to the intent of the Legislature that doubt must be solved in favor of the State."

Minot vs. P. W. & B. R. R., 5 U. S., 226.

HOOPER ALEXANDER,
Of Counsel for Appellant.

APPENDIX A.

AN ACT to incorporate the Georgia Rail Road Company, with powers to construct a Rail or Turnpike road from the city of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan county, and Athens, to be carried beyond those places, at the discretion of said company, to punish those who may willfully injure the same, to confer all corporate powers necessary to effect said object, and to repeal an Act entitled "An Act to authorize the formation of a company for constructing a Rail Road or Turnpike from the city of Augusta to Eatonton, and thence westward to the Chattahoochee river, with branches thereto, and to punish those who may injure the same," passed the 27th of December, 1831.

Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same, That the company provided for in this Act, and hereinafter more especially incorporated and authorized, shall and may direct and confine their first efforts and enterprise to the formation and completion of a rail road communication between the city of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which road shall be called the Union Rail Road;—and the same being completed, the company shall have power to construct three branch rail roads, beginning at the point agreed upon as the termination of the Union road, or such point for the middle road as the stockholders may select: one running to Athens—one to Eatonton—and the third to Madison, in Morgan county; which branches shall be erected simultaneously: *Provided, the amount of stock subscribed* will warrant the completion of all at the same time: and if *the stock subscribed* will not

warrant the completion of all of said branches at one and the same time, then that branch shall be first completed which the stockholders may by vote designate. The company shall have the further power to continue the Athens branch towards any point which may be agreed upon, on the Tennessee river—All of which shall be done at such time and in such manner as the stockholders may direct.

SEC. 2. *And be it enacted by the authority aforesaid*, That the company shall have the exclusive privilege of constructing rail roads from any point in this State within twenty miles of the road herein designated as the Union road and its branches, leading to Eatonton, Athens and Madison, continuously to the city of Augusta, for and during the term of thirty-six years.

SEC. 3. *And be it enacted by the authority aforesaid*, That *the stock of the company*, authorized and incorporated by this Act, shall consist of fifteen thousand shares, of one hundred dollars each share, and the said company to be formed *on that capital;* but the said company shall be at liberty to enlarge their capital, as in the progress of their undertaking they may find necessary; and that, either by additional assessments on the original shares, not to exceed in the whole the sum of twenty dollars in addition to each original share, or by opening books for enlarging their capital by new subscriptions in shares of not more than one hundred dollars, so as to make their capital adequate to the works they may undertake, and also to prescribe the terms and conditions of the new subscriptions. And it shall be lawful for the company, from time to time, to invest so much, or such parts of their capital, or of their profits, as may not be required for immediate use, and until it may be so required, in public stock of the United States, or of this State, or of

any incorporated bank, or lend out the same at interest, on good security, and draw and apply the dividends, and when and as they shall see fit, sell and transfer any parts or portions thereof: *Provided*, That nothing herein contained shall be so construed as to authorize said company to issue bills of credit, or to loan out any monies at a greater rate of interest than eight per cent.

SEC. 4. *And be it enacted by the authority aforesaid*, That books for *subscription to the stock of the company* hereby authorized, shall be opened in Athens and Eatonton for two thousand five hundred shares in each place, to-wit:

In Athens, by William Williams, James Camak, Stephens Thomas and William Dearing.

In Eatonton, By Josiah Flournoy, Henry Branham, C. P. Gordon and Irby Hudson.

In Madison, for two thousand shares, by L. Johnson, E. A. Nisbet, A. G. Saffold and J. B. Walker.

In Greensborough, for fifteen hundred shares, by N. Lewis, Thomas Stocks, Thomas Cunningham and W. C. Dawson.

In Sparta, for one thousand shares, by William Terrell, Joel Crawford, W. H. Sayre and Charles E. Haynes.

In Warrenton, for five hundred shares, by Thomas Gibson, Henry H. Lockhart, Gray A. Chandler and Solomon Locket.

In Crawfordville, for five hundred shares, by Absalom Janes, John Mercer, Henry B. Thompson and Archibald Gresham.

In Augusta, for fifteen hundred shares, by Thomas Cumming, Wm. H. Turpin, Wm. C. Micou and John W. Wilde.

In Washington, for one thousand shares, by D. P. Hillhouse, Samuel Barnett, Joseph W. Robinson and L. S. Brown.

In Lexington, for one thousand shares, by John Moore, John Banks, Joseph H. Lumpkin and Edward Cox; and,

In Appling, for one thousand shares, by Thomas N. Hamilton, Archer Avery, Watt L. Collins and Winsley Hobby.

And the books by said commissioners, or a majority of them, shall be opened in each of the said places, on the same day, which is hereby fixed to be on the first Monday of February next; and the different sets of commissioners shall advertise the time and place of subscribing in the public gazette or gazettes of the places respectively; and if no gazette be published at any of the places, these commissioners shall advertise in the Georgia Journal and Federal Union; and such advertisement shall be inserted for at least three weeks prior to the day fixed for opening the books: *Provided*, That if any of the commissioners at the time of opening the books, shall be sick or unable to attend, the other three commissioners, or a majority of them, may choose a proper and discreet person to supply his place; and if any of the commissioners before named, shall after the passing, of this Act, renounce or decline acting, the Governor, upon being apprised thereof, is hereby requested to nominate and appoint fit and proper person or persons to supply the vacancy of him or them so declining to act. Upon the books being opened as aforesaid, the commissioners, or a majority of them,

shall receive from individuals, corporations, or companies, subscriptions for so many shares as they may see fit to subscribe for, not exceeding one hundred, until three days shall have expired, and after that, for any number of the remaining shares they may think proper, on the condition that at the time of subscribing, there shall be paid down to the commissioners or a majority of them, five dollars on each share subscribed; for which they shall give a receipt and directly deposit the money in the Central Bank of Georgia, or any other incorporated bank, subject to the draft or order of said company, by its president or board of directors, after the company shall be organized.

SEC. 5. *And be it enacted by the authority aforesaid*, That the books shall be kept open for ten days at each place, between the hours of nine in the morning and three in the afternoon; and being closed, on the last day, each set of commissioners shall transmit to the commissioners in Athens a list of the subscribers, designating on such list as in the subscription books, the days on which the persons respectively subscribed, with the number of shares, and sums paid set opposite to each name, with a certificate at the bottom of the list, to be signed by each commissioner, that the money is deposited in the bank, conformably to this Act; and thereupon the commissioners in Athens shall, from all the lists of subscribers, make out one general list, specifying the days respectively on which each subscribed, so that on summing up the whole it may appear *whether the stock is filled up, or* falls short of *the aforesaid capital.* If the number of shares subscribed, and five dollars each paid thereon, shall fall short of the fifteen thousand shares, but amount to five thousand shares, the said company may be formed thereon; and for the residue of the original

number of shares the said corporation when organized, may cause books to be opened by the directors, under sixty days' notice of the time and place of subscription, and receive such additional subscriptions as can be obtained, on the same terms as aforesaid, of five dollars being paid on each share at the time of subscription; and may keep the books open until the whole number of fifteen thousand shares shall be subscribed.

SEC. 6. *And be it enacted by the authority aforesaid*, That for the organization of the company, the commissioners at Athens shall appoint a convenient time and place for the meeting of the stockholders, which they shall cause to be advertised in one or more of the gazettes aforesaid, for three weeks in succession, previously to the day; at which time and place the subscribers may attend in person, or be represented and vote by proxy; and no one but a stockholder shall be capable of being a proxy, and the appointment shall be in writing, signed by the appointing member, and duly authenticated by the oath of a subscribing witness endorsed thereon, or annexed thereto by a lawful magistrate; and the meeting being assembled, the proxies examined and admitted, and a proper registry made of all subscribing members, by person or by proxy, who may be present, the Athens commissioners, or a majority of them attending, shall present a balloting box, in which the subscribers may vote for officers by ballot; and the presiding commissioners shall count the ballots, enter the same, and declare the result of the election, of which they shall make and deliver proper certificate or certificates under their hands. The officers to be elected shall consist of a president and twelve directors, for the first year, and thereafter such number of directors as may be established by the by-laws, to serve for one year, and until a new election be made.

SEC. 7. *And be it enacted by the authority aforesaid,* That in the said election for president and directors, the votes shall be taken by the following rule: Each subscriber shall be entitled to a number of votes equal to the number of shares he may hold in *the stock of said company.* And on all future elections of president and directors, in the making, altering or repealing of by-laws, in determining on measures involving the general interests of the company at any stated or occasional corporate meeting, the votes shall be governed by the above stated rule.

SEC. 8. *And be it enacted by the authority aforesaid,* That the election of president and directors shall be made annually, according to a by-law to be made for that purpose: and in case any vacancy occur in the board between two periods of general election, the board of directors, or a majority of them, at any stated and regular meeting of the board, may elect by ballot, from among the stockholders, a person to fill the vacancy so occurred, until the next general election of directors. But if it should so happen that the day of annual election of president and directors shall pass without an election being effected, or any of them, the corporation shall not thereby be dissolved or deemed to be discontinued; but it may be lawful on any other day, to hold and make such election, in such manner as may be prescribed by the by-laws of the corporation, subject always to the rule prescribed in the seventh section of this Act.

SEC. 9. *And be it enacted by the authority aforesaid,* That the aforesaid company, to be organized as aforesaid, shall be called "The Georgia Rail Road Company," and shall have perpetual succession of members, may make and have a common seal, and break or alter it at pleasure; and by their corporate name aforesaid, may sue and be sued, answer and

be answered unto, in all the courts of law and equity, or judicial tribunals of this state; and shall at all times be capable of making and establishing, altering and revoking all such regulations, rules and by-laws for the government of the company and its direction, as they may find necessary and proper for the effecting of the ends and purposes intended by the association and contemplated in this act: *Provided*, such rules and regulations, and by-laws, shall not be repugnant to the laws and constitution of this state.

SEC. 10. *And be it enacted by the authority aforesaid*, That the said Georgia Rail Road Company shall have power and capacity to purchase, and have and hold, in fee simple, or for years, to them and their successors, any lands, tenements or hereditaments, that they may find necessary for the site, on and along which, to locate, run and establish the aforesaid rail road and rail roads, or any branches thereof; or to vary or alter the plan or plans, and of such breadth and dimensions through the whole course of the road and roads, as they may see fit; and also, in like manner, to purchase any lands contiguous, or in the vicinity of the rail road and rail roads, hereby authorized, that they may find necessary for the procuring, and from time to time, readily obtaining all necessary or proper materials, of what kind soever, for the constructing, repairing, and adequately guarding and sustaining the said rail road or rail roads, and in like manner to purchase all rights of way on land and all necessary privileges in waters or water courses that may lie on or across the route which the said rail road or rail roads may pass; and also all lands contiguous thereto that may be found necessary for the erection of toll houses, store houses, workshops, barns, stables, residences and accommodations for servants or agents or me-

chanics, and for the stationing and sustaining of all animals of labor. And the said company shall have power, if need be, to conduct the railroad across any public road, and by suitable bridges, over and across all or any rivers, creeks, waters, or water courses that may be in the route; or if they should deem it more convenient and suitable, may pass carriages using the road, by convenient boats, across the same: *Provided*, That the said company shall so construct their rail road across all public roads as not to obstruct or injure the same.

SEC. 11. *And be it enacted by the authority aforesaid*, That in all or any case where land or private rights of way may be required by the said company, for the purposes aforesaid, and the same cannot, for want of the agreement of the parties as to price or for any other cause, be purchased from the owner or owners, the same may be taken at a valuation to be made by commissioners, or a majority of them, to be appointed by the inferior court of the county where any part of the land or right of way may be situated. And the said commissioners, before they act, shall severally take an oath before some justice of the peace, faithfully and impartially to discharge the duties assigned them. In making said valuation, the commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken or the right of way obstructed. The proceedings of the said commissioners, accompanied with a full description and plat of the said land, shall be returned under the hands and seals of a majority of the commissioners to the court from which the commission issued, there to remain of record. And the lands or right of way, so valued by the commissioners, shall vest in the said company, in fee simple, so soon as the valuation thereof may be paid, or when refused, may be tendered.

SEC. 12. *And be it enacted by the authority aforesaid*, That the said Georgia Rail Road Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandize, and produce, over the rail road and rail roads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents cents per mile for every passenger; *Provided always*, that the said company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the rail road or rail roads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. And it shall be lawful for the said company to use or employ any section of their intended rail road, subject to the rates before mentioned, before the whole shall be completed, and in any part thereof, which may afford accommodation for the conveyance of persons, merchandize or produce. And the said company shall have power to take, at the store houses they may establish on or annexed to their rail road, all goods, ware, merchandize, and produce, intended for transportation or conveyance; prescribe the rules of priority; and charge such just and reasonable terms and compensation for storage and labour, as they may by rules establish, (which they shall cause to be published) or as may be fixed by agreement

with the owners; which compensation shall and may be distinct from the aforesaid rates of transportation.

Sec. 13. *And be it enacted by the authority aforesaid*, That if any person or persons shall intrude upon the said rail road or rail roads, or any part thereof, by any manner of use thereof, or of the rights or privileges connected therewith, without permission or contrary to the will of the said company, he or they shall forthwith forfeit to the company all the vehicles and animals that may be so intrusively introduced and used thereon, and the same may be seized by the company or its agents, or recovered by suit at law; and moreover, the person or persons so intruding shall and may be indicted as for a misdemeanor, and upon conviction fined or imprisoned, or both, at the discretion of the court of the county. And if any person shall willfully and maliciously destroy, or in any manner hurt, damage, injure or obstruct, or shall willfully and maliciously cause, or aid and assist, or counsel or advise, any other person or persons to destroy, or in any manner to hurt, damage or injure or obstruct the said rail road, or any branch thereof, or any bridge connected therewith, or any vehicle, edifice, right or privilege granted by this Act, and constructed for use, under the authority thereof, such person so offending shall be liable to be indicted, and, on conviction thereof, shall be imprisoned at hard labour in the Penitentiary, at the discretion of the court, not less than four years, and shall be further liable to pay all the expense of repairing the same. The one-half of all the fines that may be imposed by the court, under this Act, shall be paid to the informer, and the other half to the said company.

Sec. 14. *And be it enacted by the authority aforesaid*, That whenever the company aforesaid shall see

fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said railroad, and the locomotive power that shall be used with them.

SEC. 15. *And be it enacted by the authority aforesaid*, That the exclusive right to make, keep up, and use the rail roads and transportations authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: *Provided*, That the subscription *of stock or shares of said company* to the amount of at least five thousand shares, as aforesaid, be filled up within six months from the passing of this Act, and the work from or between Augusta and either of the places hereinbefore first mentioned, be commenced within two years, and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other rail roads, for the trade and intercourse contemplated herein; *Nevertheless*, The Georgia Rail Road Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use railroads over and through such parts of the country that shall so have expired by the foregoing limitation; but

the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated company: *the stock of the said company* and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

SEC. 16. *And be it enacted by the authority aforesaid*, That after the president and directors shall be elected as aforesaid, it shall always be in the power of the said president and directors, at a meeting of the board, a majority being present, to nominate and appoint a secretary, a treasurer and all other officers, agents and servants that they may deem necessary, or as may be prescribed in the by-laws of said company, removable at the pleasure of the board of directors; and also require and take from all officers, agents and servants, such bond or bonds and security as the board or by-law may prescribe, for securing the fidelity, obedience, accountability and correct conduct of the officers, agents or servants so appointed, and their punctually surrendering up all monies and property on their being removed or displaced, or the term of their appointment expiring.

SEC. 17. *And be it enacted by the authority aforesaid*, That the President and directors, by an order signed by the President, shall have power to draw from the Central Bank of Georgia, or other banks of deposit, all such monies as may have been received by the different sets of commissioners, for the first payments by subscribers on their subscription of stock as before provided.

SEC. 18. *And be it enacted by the authority aforesaid*, That every person who shall be a subscriber to, or *holder of stock in the said company*, shall pay to the company the instalment of fifteen dollars on each and every share, in such periods of not less than six months, as shall be prescribed and called for by the directors, after which the directors may call for the further moiety of each share, in payments not exceeding fifteen dollars per share, in periods of not less than six months, of which periods of payment by instalment on the shares, and the sums required, the board of directors shall cause public notice to be given for at least four weeks previously to the day of payment, by advertising the same in one or more of the gazettes of Milledgeville and Augusta. And failure to pay up any one of the instalments so called for as aforesaid, shall induce a forfeiture of the share and shares on which default shall be so made and all past payments thereon, and the same shall vest in and belong to the company, and may be appropriated as they shall see fit. It shall be the duty of the company, as soon as may be after they are organized, or of the board of directors, to issue scrip to each subscriber for the shares he holds, and deliver the same at the time of the second payment; on which, if convenient and practicable, receipts for the instalments paid and that may successively be paid, may be endorsed, and the scrip issued may be made assignable and transferable in person or by attorney, at the office and on the books of the company; and the said corporation shall and may, in and by their by-laws, rules and regulations, prescribe the mode of issuing the evidences of shares of stock and the terms and conditions, as also the times and manner in which shares in the company may be transferred.

SEC. 19. *And be it enacted by the authority aforesaid*, That whensoever the said company shall find

occasion to increase *their capital* by additional assessments on the original shares as before mentioned, in the third section of this act, within the limits therein mentioned, the said further sum on each share shall not be called for in less than two instalments at similar periods, and like notices as are mentioned and provided in the immediately preceding section; and failure to pay up such additional assessments shall in like manner, as therein provided, induce a forfeiture to the company of the share or shares of stock on which default should so be made.

SEC. 20. *And be it enacted by the authority aforesaid,* That the president and directors shall be styled "The Direction of the Corporation," and shall make all contracts and agreements in behalf thereof, and have power to call for all instalments, declare all dividends of profits and to do and perform all other acts and deeds which by the by-laws of the corporation they may be empowered or required to do and perform; and the acts of the Direction, or their contracts, authenticated by the signatures of the president and secretary, shall be binding on the corporation without seal. Regular minutes shall be kept for all meetings of the Direction, and of the acts there done; and the direction sholl not exceed in their contracts *the amount of the capital* of the corporation; and in case they shall do so, the president and directors who are present at the meeting at which such con who are present at the meeting at which such contract or contracts so *exceeding the capital,* shall be made, shall be jointly and severally liable for the amount of the excess both to the contractor or contractors and to the corporation; *provided,* that any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded in the minutes of the Direction, and giving such notice thereof to the next general meeting of the stockholders.

SEC. 21. *And be it enacted by the authority aforesaid*, That the Direction shall, once in every year at least, make a full report on the state of the corporation and of its affairs, to a general meeting of the stockholders, and oftener, if so directed by the by-laws; and shall have power to call a general meeting of the stockholders, when the Direction shall deem it expedient; and the corporation may provide in their by-laws for occasional meetings being called and prescribe the mode thereof.

SEC. 22. *And be it enacted by the authority aforesaid*, That if the company, instead of constructing the railroads herein specified, should deem it preferable to construct common roads, and use steam carriages thereon, they shall have power to do so, under the same regulations, and with the same privileges in all respects, as are herein prescribed in relation to rail roads.

SEC. 23. *And be it enacted by the authority aforesaid*, That the Act entitled "an Act to authorize the formation of a company for constructing a rail road or turnpike from the city of Augusta to Eatonton, and thence westward to the Chattahoochee river, with branches thereto, and to punish those who may injure the same," passed the 27th December, 1831, is hereby repealed, in every clause and section thereof; and this Act of incorporation shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, without special pleading.

SEC. 24. *Be it enacted by the authority aforesaid*, That whensoever a number of stockholders in interest amounting to three thousand shares, shall unite for the furtherance, construction and completion of either of said branches of said road, they shall have power to terminate said Union road, and may at such time and place as they may choose and desig-

nate, determine for themselves the point or place of diverging with such branch of said road as they may then and there point out and ascertain to be identified with their interest as stockholders: *Provided*, the said stockholders, so electing, shall have given to said Union Company, their agents or attorney, ten days previous notice of such their choice, of their respective names and *their respective amounts of stock*, and of the point or place of their intended disunion. That said stockholders so electing and determining as aforesaid, shall and may then and there be and exist as a separate body corporate, and shall then and there and thenceforward have, use and exercise all rights, privileges, immunities and enjoyments hereby given, granted and secured to said Union Company to attach, be held, used, and exercised by said stockholders so electing as aforesaid, of, for, on account of, and to the particular road to which they may then and there direct and apply themselves. That their powers as a corporate body shall be similar, and their rights, privileges and immunities in regard to said road, so diverging, shall be the same and subject to the same restrictions, as herein and hereby provided, imposed and granted to, upon and for the said Union Company. They shall not be called on by said Union Company, from and after the day of their said election and determining said point of diverging, for any other or further payment on stock, but may proceed as a distinct company to construct a branch of said road to and through the respective points, Eatonton, Greensborough and Madison or Athens respectively, according to circumstances, as they may choose—and said stockholders so electing and determining as aforesaid, shall be known according to the branch to which they shall respectively attach themselves by the corporate name and style of the Eatonton Rail Road, the Greensborough

and Madison Rail Road, or the Athens Rail Road. And said branch companies, so named, shall and may apply *the residue of their stock*, unpaid and unapplied at said time of diverging, to the separate and sole use and construction of the branch to which each may be attached, and shall and may have, use and enjoy, all the rents, issues and profits of said branch to which they may be attached, to the sole use, benefit and behoof of themselves, their heirs and assigns, for the time heretofore limited to said Union Company, and according to the provisions of this act. They shall in no way be liable to each other as separate companies, for the expenses or repairs of their respective roads, nor in any way responsible for each other's acts, from and after the time and place of disunion or diverging, designated aforesaid, so long as they may remain and exist as separate companies. The stockholders in the Union road, to the point of diverging, shall nevertheless exist as one corporate body, an dbe liable as such that far, and receive the benefits of said Union road to said point, according to the provisions hereinbefore contained: *Provided*, That nothing herein contained shall prevent said branch companies from uniting their interests and efforts, as circumstances mutually moving them may suggest.

Sec 25. *And be it enacted by the authority aforesaid*, That whenever any person shall own land on both sides of said rail road, at any point, the company shall be bound to suffer such owner to construct for his own convenience, such roads or bridges across the said rail road or its branches as may not obstruct or incommode the passage on or along the rail road.

Assented to 21st December, 1833.

APPENDIX B.

An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act.

SECTION 1. *The General Assembly do enact,* That, from and after the passage of this Act, the presidents of all the railroad companies in this State shall be required to return, on oath, annually, to the Comptroller-General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller-General.

SEC. 2. *Be it further enacted,* That said presidents shall pay to the Comptroller-General the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding Section, or on failure to pay the taxes so assessed, the Comptroller-General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

SEC. 3. *Be it further enacted,* That if any railroad company affected by the first and second Sections of this Act desires to resist the collection of the tax herein provided for, said company, through

its proper officer, may, after making the return required in the first Section of this Act, and after paying the tax levied on such corporation by the tax Act for 1873, and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton county, to be there determined as other illegalities, only the same shall have precedence of all cases in said Court, as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, on the part of the Comptroller General and of said corporation, in which cases the Comptroller General shall be represented by the Attorney General of the State, or such other attorney as the Governor may select, and if the grounds of such illegality be not sustained, the Comptroller General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the Act, and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller General.

SEC. IV. Repeals conflicting laws.

Approved Feb. 28, 1874.

APPENDIX C.

Franchises, How Taxed.

No. 145.

An Act to provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, That the term "special franchise," as used in this Act, shall include every right and privilege exercised within this State granted to any person, partnership or corporation by the State or its authority, or by any county or county officer, or officers, or any municipal corporation or officer thereof, for the exercise of the power of eminent domain, or for the use of any public highway or street, or the land above or below any highway or street within the limits of said State, and every special right exercised within this State granted by charter, resolution, by-law, statute or otherwise, whether under the laws of this or any other State, for the exercise of any public service, such as the construction and operation of railroads equipped for steam, electricity, horse-power, compressed air, or otherwise, for the common carrying of passengers or freight; the construction or operation of any plant or plants for the distribution and sale of gas, water, electric lights or power, steam heat, refrigerated air, or other substances by means of wires, pipes or conduits made under or above any street, alley or highway, or the construction and operation of any telephone or telegraph plant; all rights to conduct wharfage, dockage or cranage business; the conduct of any express business or the operation of sleeping, palace, dining or chair cars; all rights and privileges to con-

struct, maintain or operate canals, toll roads or toll bridges; the right to carry on the business of maintaining equipment companies, navigation companies, freight or passenger depots, and every other like special function dependent upon the grant of public powers or privileges not allowed by law to natural persons or involving the performance of any public service, not including the mere right to be a corporation by trading or manufacturing, or other corporation exercising no special franchise above enumerated.

Sec. 2. Be it further enacted by the authority aforesaid, That on or before the first day of May in each and every year, every person, partnership or corporation holding or owning and exercising any special franchise or franchises within the State of Georgia, shall make a special return, sworn to by such person or member of such partnership, or by the president, vice-president or secretary of such corportion, to the Comptroller-General, stating the value of said franchises as exercised within this State, and particularly describing the same, accompanying said return with a certified copy of every statute, ordinance, resolution, contract or grant under and by authority of which said franchises are held, claimed or owned; provided, nevertheless, that where such certified copies have once been filed with or returned to said Comptroller-General, it shall not be necessary in any subsequent annual return to duplicate the same, but the same shall be considered returned by reference to the copies filed as required by this Section.

Sec. 3. Be it further enacted by the authority aforesaid, That the Comptroller-General shall not be bound to accept the valuation assigned to such franchises in the return made, but it shall be his right

and duty to review the same, and in case of his refusal to accept the return, the subsequent proceedings shall be in all particulars the same as are now provided by law in the case of his refusal to accept the returns made by railroad companies of their physical property, and said franchises shall be taxed at the same rate as other property upon the value thereof as returned, or if the value returned is not accepted, upon the value as above ascertained, the said tax to be levied and collected as now provided in case of the property of railroad companies.

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APPENDIX D.

AN ACT to authorize the formation of a company for constructing a Rail Road, or Turnpike, from the city of Augusta to Eatonton, and thence westward to the Chattahoochee River, with branches thereto, and to punish those who may injure the same.

Sec. 1. *Be it enacted by the Senate and House of Representatives, in General Assembly met, and it is hereby enacted by the authority aforesaid*, That the company incorporated and authorised, shall and may direct and confine their first efforts and enterprise, to the formation and completion of a railroad, or turnpike communication from the city of Augusta to the town of Eatonton, and from thence westward to any point on the Chattahoochee River, which the stockholders or a majority of them may think proper, in the manner hereinafter mentioned, and when such communication shall have been completed, or before, if the said company shall find it practicable and advantageous, they shall have power and authority to lay off and construct branches thereof, to any points they may think fit and proper; and the right to make, keep up and employ such rail-roads or turnpikes, shall be vested in the company herein and hereby incorporated exclusively.

Sec. 2. *And be it further enacted*, That *the stock* of the company authorised and incorporated by this act, shall consist of ten thousand shares, of one hundred dollars each share, and the said company to be formed *on that capital*: but that the said company shall be at liberty to enlarge *their capital*, as in the progress of the undertaking they may find necessary, and that either by additional assessments on the original shares, not to exceed the amount of such original share, or by opening books for enlarging *their*

capital, by new subscriptions, *in shares* of not more than one hundred dollars, and the number of such shares not exceeding ten thousand; so as to make *their capital* adequate to the work they may undertake, and also prescribe the terms and conditions of new subscriptions. And it shall be lawful for the company, from time to time, to invest so much or such parts of *their capital*, or of their profits, as may not be required for immediate use, and until it may be so required, in public stock of the United States, or of this State, or of any incorporated bank, and draw and apply the dividends, and when, and as they shall see fit, sell and transfer any parts or portions thereof.

Sec. 3. *And be it further enacted*, That books for subscription *to the stock of the company* hereby authorised, shall be opened at Eatonton, under the superintendence of Thomas Hoxey, Benjamin Fort, and L. W. Hudson; at Milledgeville, under the superintendence of Peter J. Williams, William Carnes, and Richard K. Hines; at Sparta, under the superintendence of Joel Crawford, William Terrell, and Nathan C. Sayre; at Warrenton, under the superintendence of Gray A. Chandler, John Moore, and Thomas Gibson; at Monticello, under the superintendence of Fleming Jourdan, Benj. F. Ward, and William V. Burney; at Madison, under the superintendence of John W. Porter, Stewart Floyd, and John Wingfield; at Greenesborough, under the superintendence of Charles Redd, James. S. Park, and Yelverton P. King; and at Augusta, under the superintendence of William Cumming, Samuel Hale, and P. H. Smead. And the books shall be opened in each of said places, on the same day, which is hereby fixed on the first Monday of June next; and the different sets of Commissioners shall advertise the time and place of subscription, in the public gazette or gazettes of the

places respectively, and if no gazette be published at any of the places, those commissioners shall advertise in the gazettes of Milledgeville; and each set of commissioners shall cause such time and place of subscription to be published in the Georgia Journal, as well as in the gazette of such place of subscription, and such advertisements shall be inserted for at least three weeks prior to the day fixed for the opening of the books: *Provided*, that if any one of the Commissioners, at the time of opening the books, shall be sick or unable to attend, the other two Commissioners may choose a proper and discreet person to supply his place. And if any of the Commissioners before named, shall, after the passing of this Act, renounce or decline acting, his Excellency the Governor, upon being notified thereof, is hereby requested to nominate and appoint fit and proper person or persons, to supply the vacancy of him or them so declining to act. Upon the books being opened as aforesaid, the Commissioners shall receive from individuals, subscriptions for so many shares as they see fit to subscribe for, not to exceed three hundred shares, on condition that at the time of subscribing there shall be paid down to the Commissioners, two dollars and fifty cents, on each share subscribed; for which they shall give a receipt, and so soon as possible deposit the money in some of the banks of this State, of solvent character, and most contiguous to such place of subscription, subject to the joint check of the Commissioners, for such sums as may be referred [refunded] to subscribers upon adjustment, made in the case of over subscription to the stock of the company; the residue to remain subject to the order or draft of said company, by its President or Board of Directors, after the company shall be organised.

Sec. 4. The books shall be kept open at each place for four days, between the hours of nine in the morning and three in the afternoon, and being closed on

the last day, each set of Commissioners shall transmit to the Commissioners at Eatonton, a list of the subscribers, designating on such list, as in the subscription books, the days on which the persons respectively subscribed, with the number of shares and sums paid, set opposite to each name, with a certificate at the bottom of each list, to be signed by each Commissioner, that the money has been paid, and has been deposited or is ready to be deposited in Bank, conformably to this Act, naming the bank: and thereupon the Commissioners shall, from all the lists of subscribers, make out one general list; specifying the days, respectively, on which each subscribed, so that on summing up the whole, it may appear whether *the stock is filled up* or falls short, *or exceeds the aforesaid capital.* If the number of shares subscribed, and two dollars and fifty cents each paid thereon, shall fall short of the ten thousand shares, but amount to three thousand five hundred, the said company may be formed thereon, and for the residue of the original number of shares, the said corporation when organized, may cause books to be opened by the directors, under sixty days notice of the time and place of subscription, and receive such additional subscriptions as can be obtained, on the same terms as aforesaid, of two dollars and fifty cents being paid on each share, at the time of subscription; and may keep the books open until the whole number of ten thousand shares shall be subscribed; but if the number of shares which shall be subscribed for at the first opening of the books, before the Commissioners aforesaid, shall exceed ten thousand shares, then the shares shall be reduced to that number ratably, or in the same ratio of per centage: *Provided*, no subscription of five shares or less shall be reduced thereby.

Sec. 5. *And be it further enacted*, That on subscriptions of *shares in the stock of the company*, to

any amount exceeding the number of three thousand five hundred as aforesaid, being made, or in case of excess of subscriptions, upon the number being reduced to ten thousand in manner aforesaid, the said company shall be considered as formed, and this act of incorporation shall and may attach and become effectual, and the corporation may take measures to become organized. For this purpose the Commissioners in Eatonton shall appoint a fit and convenient time and place for the meeting of the stockholders, which they shall cause to be advertised in one or more of the gazettes at Milledgeville, for five weeks in succession, previously to the day; at which time and place, the subscribers may attend in person, or be represented and vote by proxy: (and no one but a subscriber shall be capable of being a proxy, and the appointment shall be in writing, signed by the appointing member, and duly authenticated by the oath of a subscribing witness, endorsed thereon, or annexed thereto by a lawful magistrate,) and the meeting being assembled, the proxies examined and admitted, and a proper registry made of all the subscribing members, by person or by proxy, who may be present, the Eatonton Commissioners, or a majority of them, attending, shall present a balloting box, in which the subscribers may vote for officers by ballot: and the presiding Commissioners shall count the ballots, enter the same, and declare the result of the election, of which they shall make and deliver proper certificate or certificates, under their hands. The officers to be elected shall consist of a President and twelve Directors, to serve for one year, and until a new election be made.

Sec. 6. *And be it further enacted*, That in the said election for President and Directors, the vote shall be taken by the following scale: The owner of one or two shares shall be entitled to one vote; the owner

of not less than three shares nor more than four shares, shall be entitled to two votes; the owner of not less than five shares nor more than six shares, shall be entitled to three votes; the owner of not less than seven shares nor more than eight shares, shall be entitled to four votes; the owner of not less than nine shares, nor more than eleven shares, shall be entitled to five votes; the owner of not less than twelve shares nor more than fifteen shares, to six votes; the owner of not less than sixteen shares nor more than twenty shares, to seven votes; the owner of not less than twenty-one shares nor more than twenty-six shares, to eight votes; the owner of not less than twenty-seven shares nor more than thirty-three, to nine votes; the owner of not less than thirty-four shares nor more than forty shares, to ten votes; and the owner of every ten shares over forty, shall be entitled therefor to one vote. Any person being a subscriber or stockholder, who may offer to vote as a proxy, may be required by any subscriber or stockholder, to swear that he has no interest directly or indirectly *in the stock* on which he so offers to vote as proxy. A *trustee of stock* shall not vote on shares held by him in trust expressed or declared, where the *cestui que* holds other shares either in his own name or in the name of another trusted. But the *cestui que* trust may vote on all shares owned by him, whether legally or equitably, according to the scale aforesaid. And on all future elections of President and Directors, in making, altering, or repealing of by-laws, in determining on measures involving the general interests of the Company, at any stated or occasional corporate meeting, the votes shall be governed by the above scale, and the rules and regulations above mentioned.

Sec. 7. *And be it further enacted*, That the election of President and Directors shall be made annu-

ally, according to a by-law to be made for that purpose; and in case any vacancy occur in the Board, between two periods of general election, the Board of Directors or a majority of them, at any regular or stated meeting of the Board, may elect by ballot, from amongst the stockholders, a person to fill the vacancy so occurred, until the next general election of Directors. But if it should so happen, that the day of annual election of President and Directors should pass without an election being effected, or any of them, the corporation shall not thereby be dissolved, or be deemed to be discontinued, but it shall be lawful on any other day, to hold and make such election in such manner as may be prescribed by the by-laws of the corporation, subject always to the scale and regulations of the sixth clause of this act.

Sec. 8. *And be it further enacted*, That the aforesaid company, to be organised as aforesaid, shall be called "The Augusta and Eatonton Turnpike and Rail-Road Company," and have perpetual succession of members, who may make and have a common seal, and break or alter it at pleasure; and by their corporate name aforesaid, may sue, and be sued, answer and be answered unto, in all courts of law or equity, or judicial tribunals of this State: and shall at all times be capable of making and establishing, altering and revoking, all such regulations, rules and by-laws, for the government of the Company, and its direction, as they may find necessary and proper for effecting the ends and purposes intended by the association and contemplated in this act: *Provided*, such regulations, rules, and by-laws shall not be repugnant to the laws or constitution of this State.

Sec. 9. *And be it further enacted*, That the said Augusta, Eatonton, and Western Turnpike and Rail Road Company, shall have power and capacity to

purchase, and have and hold in fee-simple, or for years, to them and their successors, any lands, tenements, or hereditaments, that they may find necessary for the site, on and along which, to locate, run, and establish the aforesaid rail-road or rail-roads, turnpike or turnpikes, or any branches thereof, or to vary or alter the plan or plans, and of such breadth and dimensions through the whole course of the road and roads, turnpike or turnpikes, as they may see fit; and also in like manner, any lands, contiguous, or in the vicinity of the rail-road and rail-roads, turnpike and turnpikes, hereby authorised, that they may find necessary for the procuring, and from time to time, readily obtaining all necessary or proper materials of what kind soever, for the constructing, repairing, and adequately guarding and sustaining the said rail-road or rail-roads, turnpike or turnpikes, and in like manner to purchase all private rights of way on land, and all necessary privileges in water or water-courses, that may lie on or across the route through which the said rail-road or railroads, turnpike or turnpikes, may pass, and also all lands contiguous thereto, that may be found necessary for the erecting of toll-houses, store-houses, work-shops, barns, stables, residences, and accommodations for servants or agents, or mechanics, and for the stationing and sustaining all animals for labor. And the said Company shall have power, if need be, to conduct their turnpike or rail-road across any public road, and by suitable bridges, over and across all or any rivers, creeks, waters or water-courses, that may be in the route; or if they should find it more convenient and suitable, may pass carriages, using the road, by convenient boats across the same, or through canals connecting different parts of the rail-road or turnpike: *Provided*, the said Company shall not obstruct the navigation thereof. *And provided*, that

, right or privilege granted by
the said Company s d for use under the authority
across all public ro so offending shall be liable to
the same. onviction thereof, shall be im-

Sec. 10. *And be* an six nor less than one month
turnpike and rail-r xceeding five hundred dollars,
have the exclusive ri dollars, at the discretion of the
ance of persons, me uch conviction shall take place,
turnpike and turnpi liable to pay all the expenses
be by them construc me. The one-half of all such
the exclusive right former and the other half to the
of transportation
fifty cents per hu
cents per cubic foot *it further enacted*, That when-
every one hundred oresaid shall see fit to farm out
every passenger; other person or persons or body
Company may, whe of their exclusive right of con-
all or any part of th rtation, or shall deem it expe-
portation or convey d rail road or turnpike or any
produce, on the rail e use, they shall and may adopt
turnpikes, with the ssary rules and regulations and
or individuals, or ot ribe the construction and size or
as may be agreed u ages and vehicles, and the mate-
mentioned; and the shall be made, that shall be per-
their right of carri r to pass on the said rail road
or property, or the [locomotive] power that shall be
pany the right of
shall, so far as the
as common carriers. *it further enacted*, That the right

Sec. 11. *And be* p up the rail roads or turnpikes,
be lawful for said thereby authorized by this Act,
sections of their in aid company, its representatives
turnpike or turnpi and that during the first period
mentioned, before t *ck of said company*, and the real
in any part thereof, be purchased by them and con-
modation for the co subservient to the works herein
or produce; and al exempted from taxation.

SEC. 15. *And be it further enacted by the authority aforesaid*, That after the president and directors shall be elected as aforesaid, it shall always be in the power of said directors and president, at a meeting of the board, or a majority being present, to nominate and appoint a secretary, treasurer and all other officers, agents and servants, that they may deem necessary, as may be prescribed in the by-laws of the said company, removable at the pleasure of the board of directors; and also require and take from all the officers, agents and servants such bond or bonds and security as the board or by-laws may prescribe for securing the fidelity, obedience and accountability and correct conduct of the officers, agents or servants so appointed, and their punctually surrendering up all monies and property on their being removed or displaced, or resigning, or the term of their appointment expiring.

SEC. 16. *And be it further enacted by the authority aforesaid*, That the president and directors, by an order signed by the president, shall have power to draw from all and every one of the Banks (and the several boards of commissioners shall, and are hereby directed, to co-operate with and aid the direction in so doing, if need be) all such monies as may have been received by the different sets of commissioners, for the first payments by subscribers on their subscriptions of *stock* as before provided, except the sums for such shares, if any, as may be cancelled and thrown out by the reducing of the whole number of shares subscribed, in the event of over subscriptions as aforesaid, the money on which shares thrown out shall be paid to the subscribers by the commissioners in whose books such persons subscribed, immediately on the surplus shares being ascertained and notified to the commissioners; who shall advertise for such subscribers to call and receive their money.

SEC. 17. *And be it further enacted by the authority aforesaid*, That every person who shall be a subscriber to or *holder of stock* in the said company, shall pay [to] the company the instalment of ten dollars on each and every share in such periods of not less than sixty days, as shall be subscribed [prescribed] and called for by the directors, until one-half or fifty dollars on each share shall be paid up; after which the directors may call for the further moiety of each share, in payments not exceeding fifteen dollars per share, in periods of not less than sixty days; of which periods of payment by instalments on the shares and the sums required, the board of directors shall cause public notice to be given for at least four weeks previously to the day of payment, by advertising the same in one or more of the public gazettes in Milledgeville and Augusta, and failure to pay up any one of the instalments so called for, as aforesaid, shall induce a forfeiture of share and shares upon which default shall be so made and all past payments made thereon, and the same shall vest in and belong to the company and may be appropriated as they shall see fit; *provided*, that no instrument [instalment] shall be called for at any time between the first day of July and the first day of November,of any year. It shall be the duty of the company, as soon as may be after they are organized, or of the board of directors, to issue scrip to each subscriber for the shares he holds, and deliver the same at the time of the second payment, on which if convenient and practicable, receipts for the instalments paid, and that may successively be paid, may be endorsed; and the scrip issued may be made assignable and transferable in person or by attorney, at the office and on the books of the company; and the said corporation shall and may, in and by their by-laws, rules and regulations, prescribe the mode of issuing the evidences of*shares of*

stock, and the terms and conditions, as also the times and manner in which shares in the company may be transferred; which by-laws, rules and regulations the said company shall make known by publication for three weeks, in one or more of the public gazettes in Milledgeville and Augusta.

SEC. 18. *And be it further enacted by the authority aforesaid*, That whensoever the said company shall find occasion hereafter to increase *their capital* by additional assessments on the original shares, as before mentioned in the second section of this act, within the limits therein mentioned, the said further sum on each share shall not be called for in less than three instalments, at similar periods, and with like notices as are mentioned and provided in the immediately preceding section; nor shall the said further sum on each share be called for at any time between the first day of July, and the first day of October, of any year, and failure to pay up such additional assessments, shall, as in like manner therein provided, induce a forfeiture to the company, of the share or *shares of stock* on which default shall be so made.

SEC. 19. The President and Directors shall be styled the 'Direction of the Corporation,' and shall make all contracts and agreements in behalf thereof, and have power to call for all instalments, declare all dividend of profits, and to do and perform all other lawful acts and deeds, which by the by-laws of the corporation they may [be] empowered or required to do and perform: and the acts of the direction or their contracts, authenticated by the signatures of the President and Secretary, shall be binding on the corporation, without seal—Regular minutes shall be kept for all meetings of the direction, and of the acts there done; and the direction shall not exceed in their contracts the amount of *the capital of the*

corporation; and in case they shall do so, the President and Directors who are present at the meeting at which the contract or contracts so exceeding the capital, shall be made, shall be jointly and severally liable for the amount of the excess, both to the contractor or contractors, and to the corporation: *Provided* That any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be rendered [recorded] on the minutes of the direction, and giving such notice thereof to the next general meeting of the stockholders. The direction shall and in every year at least, make a full report on the state of the corporation and of its affairs, to a general meeting of the stockholders, [and oftener if so directed by the by-laws; and shall have power to call a general meeting of the stockholders] when the direction shall deem it expedient; and the corporation may provide in their by-laws for occasional meetings being called, and prescribe the mode thereof.

SEC. 20. *And be it further enacted by the authority aforesaid*, That in all or any case, where lands or private rights of way, may be required by the said company for the purposes aforesaid mentioned, and the same cannot, for want of the agreement of the parties as to price, or for any other cause, be purchased from the owner or owners, the same may be taken at a valuation, to be made by commissioners or a majority of them, to be appointed by the Superior Court of the county where any part of the land, or right of way, may be situated. And the said commissioners, before they act, shall severally take an oath before some justice of the peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation, the commissioners shall take into consideration the loss or damage which may accrue to the owner or owners in con-

sequence of the land being taken, or the right of way obstructed, and also the benefit and advantage he, she, or they, may receive from the establishment of said [the rail] road or turnpike; and shall state particularly, the nature and amount of each: and the excess of loss and damage over and above the benefit and advantage, shall form the measure of valuation of the said land, or right of way. The proceedings of the said commissioners, accompanied with a full description and plat of the said land, shall be returned under the hands and seals of a majority of the commissioners, to the court from which the commission issued, there to remain of record. In case either party to the proceedings shall appeal from the said valuation to the next session of the court granting the commission and give ten days notice to the opposite party of said appeal, the court, upon satisfactory proof that the appellant has been injured by the said valuation, shall order a new valuation to be made by a jury of twelve men, who shall be charged therewith in the same term, and their verdict shall be fixed and conclusive between the parties, unless a new trial shall be granted; and the land or rights of way, so valued by the commissioners or jury, shall vest in the said company in fee simple, so soon as the valuation there- may be paid, or when refused, may be tendered. Where there shall be an appeal as aforesaid, from the valuation of commissioners, by either of the parties, the same shall not prevent the works intended to be constructed from proceeding: but where the appeal is made by the company requiring the surrender, they shall be at liberty to proceed in their work, only on condition of giving to the opposite party a bond with good security, to be approved of by the clerk of the court, where the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of the said valua-

tion and interest, in case the same be sustained: and in case it be reversed for the payment of the valuation to be made to the jury, and confirmed by the court.

SEC. 21. *And be it further enacted*, That nothing in this act shall prevent the State from uniting to the said rail road, any road or canal or other public work which may be necessary for the benefit of the citizens thereof, but it shall at all times be in the power of the Legislature to open any other rail road or canal, or pass any public work to, or across the said rail road or roads, whenever it shall be deemed necessary for the general good: *Provided*, the same does not obstruct or impede the free use of the said rail roa dor roads.

SEC. 22. *And be it further enacted by the authority aforesaid*, That nothing in this act contained, shall be so construed as in any degree to interfere with the rights and powers of the constituted authorities of this State, or any county thereof, appertaining to the public high-ways which are or hereafter may be established or sanctioned by legal authority.

SEC. 23. *And be it further enacted*, That nothing in this act shall be so construed, as to prevent the aiteration or repeal of any part of this act, should any subsequent General Assembly deem such alteration or repeal expedient.

Assented to, Dec. 27, 1831.

APPENDIX E.

The imposition of a tax in 1796 of "*fifty cents on every hundred dollars of the funded stock of the United States, to be given in by the holders thereof,*" did not relate to bonds of the United States, but to shares of stock in the Bank of the United States.

Georgia had not, prior to that time, taxed intangible values at all. Economic changes resulting in new forms of property are apt to produce a gradually developing popular consciousness of some sort of inequality in the public burdens, and the expression of this feeling in new forms of taxation is usually accompanied by some indication of public irritation and some tendency toward excess in the new levies.

There is no historical evidence of any jealousy at that period against the creditors of the government. Banks, however, and especially banks of issue, were a new form of investment. They were causing economic re-adjustments and growing pains; there was irritation against them, and this particular bank was the object of an aggravated jealousy growing out of political and sectional differences.

See *Gouge on Paper Money and Banking.* (1833). Part 2, Chap. 5, page 38.

The rate imposed on the stock by the Act in question was considerably higher than that laid on other forms of personalty.

The Act of 1796 was re-enacted annually with this item in it for a decade. The last time the item ap-

peared was in the Tax Act of Dec. 12, 1804, printed in full in *Clayton's Digest of the Laws of Georgia*, pp. 226-240. The next Act, (approved Dec. 4, 1805,) laid a tax of 2½ per cent. on "the amount of capital of any bank or banks in this State" and required the return made and tax paid by the corporation under stringent regulations. The section is reproduced in the brief, (page 37), and its terms clearly indicate strained relations. The tax on "funded stock, etc., to be paid by the holder," never reappeared until 1821, when, as shown in the brief, the tax on the "capital" was expressly repealed and return made to the original plan of taxing the stock "owned by any individual in this State." The tax on the aggregate capital imposed by the Act of 1805 was reduced to 31¼ cents on the hundred dollars before it was ever collected the first time, the amending Act (June, 1806) as shown on page 38 of the brief, referring to it as a tax "on the Branch Bank of the United States at Savannah." It was annually reenacted until 1821 when it was repealed. The Act of Dec. 10th, 1807, continuing it in force exempted the Planter's Bank from its operation. This was the earliest Georgia bank, was chartered in 1807 and rechartered in 1810 as already shown. In 1821 there were four State banks in Georgia and this was no doubt in part the explanation of the return that year to the tax on individual shares in the Bank of the United States, and the repeal of the tax on aggregate capital of all others.

The facts above stated are almost conclusive in themselves of the proposition that the tax of 1796

referred to shares in the bank. There is other evidence, however.

The last time this tax appeared was in the Act of 1804, in which the identical language of the Act of 1796 was adhered to, including the requirement that the tax be returned by the holder. The compiler of the digest makes this foot note:

> "See Act of 1805, No. 192, pointing out the mode of collecting this tax in case the directors of the bank are in default."

The reference is to the Act of 1805, (see page 37 of the brief,) and the foot note can only be regarded as equivalent to a statement by the compiler of the digest that the term "funded stock of the United States" means shares in The Bank of the United States.

It is therefore pertinent to inquire as to the value of his testimony

The compiler was Augustin Smith Clayton, one of the most eminent and respected jurists of Georgia, where his name ranks as *clarum et venerabile*. The digest was officially compiled in obedience to an Act approved Dec. 12, 1809, (*Clayton*, page 528,) whereby it was provided that the Legislature should by joint ballot "appoint some fit and proper person" for that purpose, the work to be reported to the Governor and the Governor to "approve" it before printing. The Governor passed upon it through a committee of four of the most eminent lawyers of the State, who reported *inter alia:*

> "They, (i. e. the committee,) have also examined the notes of reference made by the compiler and found them appropriate."

Of other notes they say:

> "The marginal notes with an index to the whole they have thought proper to leave with the compiler, whose talents and judgment they deem amply sufficient to ensure their correctness."

The opportunities of the compiler to know were perfect, the legislation in question and the resultant and accompanying controversies continuing, as shown in the brief, down to 1821, and his observations being made *dum fervuit opus*. As far as human testimony can go, it has all the indicia of reliability. The witness was both capable and upright. He had no reason to testify incorrectly. His professional reputation forbade his so doing. He was not only in the midst of the history then being made, but it was his official business to know its significance. Eminent lawyers, personally and officially interested in correct results, officially reported that the note was "appropriate" and that his talents and judgment were "amply sufficient to ensure its correctness," and the Governor, reciting all these facts, made proclamation as follows:

> "Now know ye, legislators, judges, citizens and people of Georgia, that I, David Brydie Mitchell, Governor thereof, in conformity with, and obedience to the aforementioned Act, do by these presents approve of the aforesaid compilation of the laws of this State."

The testimony is corroborated by all the subsequent legislation, and the whole appears to prove that from 1796 to 1805, inclusive, the State taxed shares of stock in this bank in the hands of the holder; and that, under circumstances indicating strong feeling on the subject it changed the system in 1805 to a tax on the aggregate capital in the hands of the corporation, returning in 1821 to the tax on shares; the word "stock" being used to express the first idea, and the word "capital" the second.

Supreme Court of the United States,

ER TERM, 1908.

OCTOBE

No. 266.

Comptroller General of the State
County of Wilkes, and the
Taliaferro, Appellants,

WILLIAM A. WRIGHT, Vs.

of Georgia; The D AND BANKING COMPANY.
County of

of Joseph R. Lamar, for the
d and Banking Company.

GEORGIA RAILROA

I.

Charter of the Georgia R. R. that
ect to a tax not exceeding one-half
ceds of their investment" is a con-
y and not with the shareholders.

Brief and Argumen

Georgia Railroa

rgia Railroad, 54 Ga. 423;
Georgia Railroad, 117 Ga. 524-525.

Georgia Railroad, the word "Com-
d as a plural noun; "their invest-

PRESS BRA

ments" being equivalent to "its investments," and has been repeatedly so used by the Supreme Court of Georgia in construing this very charter.

State vs. Georgia R. R., 54 Ga. 426-427;
Gardiner vs. Georgia R. R., 117 Ga. 525;
Augusta vs. Georgia Railroad, 26 Ga. 661 (1).

II.

The provision that the stock should be subject to an Income Tax "not exceeding" one-half per cent. on the net profits, "by necessary implication prohibited" any other subject or method of taxation.

Smith vs. Stevens, 10 Wall. 321;
Sutherland on Stat. Con., Sec. 204.

III.

"The stock of the Company, as stock; as a unit; is alone what is to be subject to the tax; not parts of the stock as the part used in banking, nor the **particulars** in which the stock consists; as, the **land, cars, rails,** etc."

Augusta vs. Ga. R. R., 26 Ga. 662.

Exemption of **stock** exempts from taxation all property of the Company used for railroad purposes and contributing to the creation of the taxed income. (Record, 36, 4; 41; 48, 4; 48, 9; 49, 14.)

State vs. Georgia R. R., 54 Ga. 423;
Augusta vs. Georgia R. R., 26 Ga. 662 (2);
Western & Atlantic R. R. vs. State, 54 Ga. 429;
Rome R. R. vs. Rome, 14 Ga. 275;
Western & A. R. R. vs. State, 66 Ga. 567.
Railroad vs. Gaines, 97 U. S. 707;
Bank Tax Case, 2 Wall. 208;
Delaware, Etc., Co. vs. Pa., 198 U. S. 341;
Powers vs. Detroit Ry. Co., 201 U. S. 561.

IV.

Under the Act of 1902 the Franchise Tax is a **property tax.** The exemption of stock exempts all of the railroad **property,** tangible and intangible, including the franchise. (Record, 47, 3.)

Citizens Bank vs. Parker, 192 U. S. 74;
Adams Express Co. vs. Ohio, 166 U. S. 221;
Wilmington vs. Reid, 13 Wall. 264;
W. & A. R. R., vs. State, 66 Ga. 567;
State vs. B. & O. R. R., 48 Md. 49;
Ann Arundel Co. vs. Annapolis R. R., 47 Md. 592;
Citizens Bank vs. Burton, 10 L. R. A. (N. S.) 948;
Hancock vs. Singer Co., 41 Atlantic R. 850 (N. J.)

V.

The Washington Branch is exempt, for both the constituent companies and the consolidated company had the "tax privilege" under statutes passed before the Code of 1863, when the State for the first time reserved the power to amend and repeal private charters. (Record, 50 (15).

Tenn. vs. Whitworth, 117 U. S. 145;
Green County vs. Conner, 109 U. S. 104;
Central Railroad vs. Georgia, 92 U. S. 665.

VI.

While the minimum capital was $1,500,000, the increase up to $4,156,000 is also exempt from taxation. (Record, 47, 4.) So held in 1859 after Washington Branch had been acquired and after stock had been increased beyond $4,000,000.

Augusta vs. Georgia R. R., 26 Ga. 662;
Act 1833, p. 257, §3.

VII.

The value of the property in excess of $4,156,000 is exempt from taxation, such excess not being surplus, but representing merely the enhanced value of the property in use solely for railroad purposes. (Record, 49; 12-b, 14.)

State vs. Western & Atlantic R. R., 66 Ga. 567 (bot.), having privileges of Georgia R. R.)
State vs. Georgia R. R., 54 Ga. 427 (4);
Augusta vs. Georgia R. R., 26 Ga. 662 (2).

"The payment of this income tax covers also such property as may be necessary and proper for the use and enjoyment of the franchise secured by the lease to the Company, whether it was received from the State or has been purchased since the lease began."

State of Ga. vs. Western & Atl., 66 Ga. 563.

See also Western & Atl. vs. State, 54 Ga. 428, that Company having "the privileges of the Georgia R. R." 54 Ga. 429, 436.

Judge Bleckley's suggestion in Goldsmith vs. Georgia R. R., 62 Ga. 485, that **property in excess of the value of the capital is subject to taxation,** was necessarily OBITER, because that case was dismissed for want of jurisdiction. (Record, 11, 48 (6), 48 (7).

Hughes vs. U. S., 4 Wall. 237.

The suggestion is not binding even as a precedent. It is contrary to the ruling in Augusta vs. Georgia R. R., 26 Ga. 662 (2) & State vs. Ga. R. R., 54 Ga. 423, & by statute in Georgia, in case of a conflict, the **older decision prevails and is binding until expressly overruled.**

Acts 1858, p. 74; Code, 5588; Acts 1896, p. 44, Par. 6; Calhoun vs. Cauley, 104 Ga. 344; Strickland vs. State, 115 Ga. 226.

VIII.

The judgment sustaining the Company's plea of Res Adjudicata (Record, 48) is not in conflict with Union Bank vs. Memphis, 189 U. S. 71, and Covington vs. National Bank, 198 U. S. 100.

For, in view of the dissent in Ga. R. R. vs. Wright, 124 Ga. 597 (2), there is no settled law in Georgia as to the effect of a judgment in a tax case, when offered in support of a plea of Res Adjudicata in a suit involving the taxes of a subsequent year.

The Court, therefore, properly followed the ruling of this Court on that subject in New Orleans vs. Citizens Bank, 167 U. S. 396; Deposit Bank vs. Frankfort, 191 U. S. 499, 522.

The "thing adjudged" in 54 Ga. 423 was the validity of a contract of exemption, and that judgment is Res Adjudicata.

The decision in Augusta vs. Ga. R. R., 26 Ga. 662 expressly ruled that the **increased-stock** was exempt, and the decision in 54 Ga. 423 necessarily ruled that the increase of stock over $1,500,000, the **excess** in value **over the capital** of $4,156,000 and the Washington Branch were all exempt, **because the consolidation with the Washington Plankroad had taken place, the stock had been increased, and the property was worth far in excess of $4,156,000 long prior to the time the decision in 54 Ga. 423 was rendered.**

IX.

There was no objection to the amendment setting up the

decision in State vs. Ga. R. R. 54 Ga. 423, as Res Adjudicata, and no demurrer to the bill as amended.

Even if the effect to be given a tax judgment under a plea of Res Adjudicata is to be governed by State law, the amendment filed by the railroad did not oust the Court of jurisdiction, for the original cause "arose under the Constitution of the United States," and the injection of a non-Federal question forming an ingredient of the case would not defeat the original and rightful jurisdiction.

Osborne vs. U. S. Bank, 9 Wheat. 820-823; New Orleans Co. vs. La. Sugar Co., 125 U. S. 32, (bot.) Tenn. vs. Davis, 100 U. S. 264.

X.

The thirty-six-year limitation referred to the exclusive right to build railroads in a strip forty miles wide, and had no relation to the later and independent enactment as to tax exemption. Record, 50 (17).

Home of the Friendless vs. Rouse, 8 Wall. 437;
Powers vs. Detroit, 201 U. S. 559.

XI.

In construing the charter, the Court will consider the history of the time and the public purpose to be served in encouraging the building of the State's first railroad.

Citizens Bank vs. Parker, 192 U. S. 83;
Baltimore vs. B. & O., 48 Am. Dec. 536;
City of Augusta vs. Georgia Railroad, 26 Ga. 661;
Rome R. R. vs. Rome, 14 Ga. 275.

ISSUES.

This case involves the question as to whether the Georgia Railroad is subject to a **Property** tax or only to an **Income** tax under the provision of Section 15 of the Charter granted in 1833.

In 1875, the Supreme Court of Georgia, in State vs. Georgia Railroad, 54 Ga. 423 (Record, 66-79), decided that under its charter the Company was not subject to a Property tax, but only to a tax of one-half of one per cent. on its net income, and that the Legislature could not impair the obligations of that contract.

The Comptroller, however, insists that that case was wrongly decided, and had been overruled in 1879 by the latter case of Goldsmith vs. Georgia Railroad, 62 Ga. 485 (Record, 51-65), which later decision he says is Res Adjudicata, or at least sets the matter at large, leaving for determination now the proper construction of the 15th Section. He thereupon contends that the provision for tax on Net Income:

1. Was not a contract between the State and the Company forbidding a tax on its property, but a contract between the State and the shareholders, limiting the tax on **their shares;**

2. Or, if the provision related to the Company, it related to the minimum capital stock of $1,500,000 named in the original charter, and does not apply to the present stock of $4,156,000; nor to the value of the railroad property in excess of the present capital of $4,156,000; nor to the value of the franchise, subjected to a tax for the first time by the Act of 1902;

3. That whether it applied to shares of stock, or property of the Railroad, it was to last only thirty-six years after completion of the road, which he says was finished in 1846;

4. That whatever the Section meant, he contends that it does not apply to the Washington Branch, nor to the new Company created in 1852 by the consolidation of the Georgia Railroad and the Washington Railroad.

The numerous assignments of error involve a consideration of at least a dozen separate Acts of the Georgia Legislature, of which the Court takes judicial cognizance. Civil Code 5210.

STATEMENT OF FACTS.

But as they are not in the Record—which is itself confused because of a failure to print pleadings, evidence and decree in proper sequence—counsel for Georgia Railroad, Defendant in Error, feel that they can best serve the Court by submitting a statement of facts, which, in narrative form and as near as may be in chronological order, will briefly give material facts in the history of the Road as shown by these separate, distinct and apparently unrelated Statutes here set out as required by Rule 21 (3).

On December 21, 1833, the Legislature incorporated the Georgia Railroad Company to build a railroad or turnpike from Augusta to a place now called "Union Point," with branches to Madison and other points named. The minimum capital was fixed at $1,500,000, it being provided that:

> "The stock shall consist of 15,000 shares and the said Company shall form on that capital. But the said Company shall be at liberty **to enlarge their capital,** as in the progress of their undertaking, they may find necessary." Acts 1833, p. 256.

The hazard in 1833, of undertaking this untried experiment of building a new and costly means of transportation through a country for the most part forest was very great. No one could tell whether it would pay. It was reasonably certain that thereby crops could be marketed more cheaply and that passengers could be conveyed more swiftly. It was certain that the public would be benefitted, for even a failing road is of use to the State. But it was problematical whether any profits would ever come to those who were to furnish the funds with which to build this first great work of internal improvement in Georgia. In recognition of this fact, and in its desire to have the wilderness opened up, the Legislature offered as

INDUCEMENTS TO HAVE THE RAILROAD BUILT:

1. The exclusive right to haul cars over its track;

2. The exclusive privilege of constructing railroads through and along a strip forty miles wide **for and during the term of thirty-six years;**

3. An absolute exemption of the stock of the railroad from taxation for **seven** years after the completion of the railroad; and,

4. "AFTER THAT, the stock shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investment."

NOT A TOLL ROAD.

The title authorized the construction of a "Rail or Turnpike Road," and at the time the charter was granted, in 1833, railroads were so much an experiment that it was not definitely known whether the Company would undertake to build a railroad or a "dirt road."

Section 2 provided that "if the Company, instead of constructing a railroad, should deem it preferable to construct common roads and use steam carriages thereon" (sounds very much like automobiles), "it might pass the carriages using the road by convenient boats across all rivers, creeks and water-courses." (Acts of 1833, p. 266, 22; p. 261, 10.)

If the Company constructed a turnpike or "dirt road," it was of course known that any one, on paying toll, could haul his own carriages and vehicles over the same. But if they decided to build a "railroad," "the idea prevailed that it could be used like a public highway by all who choose to put carriages thereon, subject only to the payment of tolls." Atchison R. R. Co. vs. Denver R. R. Co., 110 U. S. 676. To prevent this, and to avoid the inevitable confusion and collision which would arise if any one at will could haul his own vehicle over the Company's tracks, the charter granted the Company.

THE EXCLUSIVE RIGHT OF TRANSPORTATION IN PERPETUITY.

Section 12 providing that the Company "shall AT ALL TIMES have the exclusive right of transportation and conveyance of persons, merchandise and produce over the railroad or railroads to be by them constructed, * * * and may, when they see fit, rent or farm out such exclusive right of transportation to any other company." Acts 1833, p. 262.

EXCLUSIVE RIGHT OVER FORTY-MILE STRIP FOR THIRTY-SIX YEARS.

As a protection against being immediately parallelled, the Legislature also gave the Company, **for and during the term of thirty-six years after its completion**, the exclusive right to construct and maintain railroads within twenty miles of the main line. Section 2 providing that:

> "The Company shall have the exclusive privilege of constructing railroad within 20 miles of the Union Road and its branches * * * for and during the term of 36 years." Acts of 1833, p. 256 (2).

But Section 15 provided that this exclusive grant for thirty-six years was subject to the **proviso** that subscription to 5,000 shares of stock should be obtained within six months from the passage of the Act; that work should be commenced within two years, and be completed within six years. "**And after said term of thirty-six years shall have elapsed,** though the Legislature may authorize the construction of other railroads, for the trade and intercourse contemplated herein, nevertheless the Georgia Railroad shall **remain and be incorporated and vested with all the estate, powers and privileges as to their own works herein granted and secured,** except the exclusive right that shall have so expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right."

Section 15 then proceeds to confer the privilege which is the immediate subject of this litigation, and provides that

TAX LIMITATION.

> "The stock of the Company shall be exempt from taxation for seven years after its completion AND AFTER THAT SHALL BE SUBJECT TO A TAX NOT EXCEEDING ONE-HALF PER CENT. PER ANNUM ON THE NET PROCEEDS OF THEIR INVESTMENTS."

BANKING POWERS.

By the Act of 1835 (p. 180), the Company was given banking powers; its name changed to "Georgia Railroad & Banking Company"; the minimum capital increased from $1,500,000 to $2,000,000, one-fourth of which was to be applied to banking purposes.

WASHINGTON BRANCH.

By the Act of December 30, 1836 (p. 208), the Company was authorized to build a branch road to Washington, and to that end, if necessary, issue $200,000 of additional stock.

EXTENSION OF MADISON BRANCH TO CONNECT WITH STATE'S ROAD BY ACT OF 1837.

The original charter had authorized the construction of a branch road to Madison (Acts 1833, p. 256). In 1837 (Acts 1837, p. 212) the Company was authorized to extend from Madison, so as to connect with a road which the State of Georgia was then building. And as illustrating the condition of the country and the risk which the subscribers incurred in making the investment, it may be noted that the road was to be built to nowhere—to an unnamed point in the forest which by reason of the road's extension has now, however, become the City of Atlanta, the capital of the State and the largest city in Georgia.

This Madison extension would aid the State in its own enterprise of railroad building. And, so to secure this extension, the Act of 1837 provided that this Madison branch should have "all the rights and privileges in the construction of the branch from Madison to the State Railroad as contained in the several Acts constituting the charter of the Company, **as fully as if the said continuation had been originally a part of the Georgia Railroad.**

INCREASE OF CAPITAL TO $4,000,000 BY ACT OF 1847.

The extension of the Madison Branch added nearly seventy-five miles to the length of the road, and soon became part of the main line from Augusta to Atlanta. This addition of nearly forty per cent. to the road's length necessarily

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apply to the increased capital [from $4,000,000 to $5,000,000 authorized by the Act of 1849, p. 239 not accepted], nor to the banking capital which the Georgia Railroad was authorized to issue, but that "the tax on net profits shall only be on the net profits of the railroad." (Construed **not** to tax banking capital. 26 Ga. 662.)

GENERAL TAX ACT OF 1854 RECOGNIZES EXEMPTION.

The General Tax Act of 1854 (Acts 1854, p. 110, §5) recognized that there were various railroad charters which exempted the property of the several companies from taxation, and respected the same, for that Act levied the same per cent. of tax upon the whole of their capital stock as is levied upon stock in trade generally, EXCEPT **that this did not apply to those railroads "whose charters exempt them from such taxation."**

ACT OF 1858 RECOGNIZES EXEMPTION.

Another and more specific legislative recognition of the Georgia Railroad's exemption from property tax is found in the Act of 1858, (Acts 1858, p. 66), authorizing the extension of a branch to Eatonton, with a right to increase the capital stock to an amount sufficient for that purpose, provided that such additional stock shall be subject to taxation as the Legislature may from time to time assess. But,

> "This reserved right to tax the additional stock authorized under this Act, **in no case, nor under any circumstances, to be construed to authorize any increase or rate of taxation upon any other stock or property connected with said Company, other than** the additional **stock** allowed by this **Act.**"

CONTEMPORANEOUS CONSTRUCTION SHOWN BY TAXING GEORGIA R. R. IN A METHOD DIFFERENT FROM THOSE IN TAXING OTHER RAILROADS.

The answer of the Comptroller (Record, 37) claims that the fact that the Georgia Railroad only paid a tax of one-half of one per cent. is of no value as contemporaneous construction. But while for several years railroads were taxed one-half of one per cent. on their net income (Acts of 1871, 276.; Acts of 1868, 154; Acts of 1869, p. 160), yet for most of the time railroads were taxed in a different way from the Georgia. From 1850 to 1854 (Acts of 1850, p. 377, §6, 379, §4), roads whose charter did not exempt them therefrom were subjected to an ad valorem tax of three mills on the value of their stock.

After 1854 railroads whose charter did not exempt them from such taxation were subjected to the same tax as that imposed on other property. (Acts of 1854, p. 110, Sec. 5)

From 1863 to 1866 (Acts of 1863, p. 80-81; Acts of 1865, p. 65) all "**railroads not exempt by a charter**" were required to return their property for taxation, and in addition were subjected to a graduated income tax.

The practice therefore of taxing the Georgia Railroad one-half of one per cent. on its net income differed from that followed as to other railroads, and has therefore the value which the Courts give to long continued contemporaneous constructions. During all this time it is admitted that no tax was ever collected from the shareholders, but that the Company was taxed in accordance with the provision of the 15th Section of the charter, which subjected the stock to an income tax, and which tax was fixed at one-half of one per cent. by the Act of 1850, p. 378, with the provision that it should be paid annually "until this Act shall be repealed."

It never has been repealed, though the Legislature unsuccessfully attempted to do so in 1874.

No effort was ever made to collect a tax from the Company on its capital of $4,156,000, or on the property in which the capital had been invested, or on the value of property in excess of the $4,156,000, until the

ACT 1874 FIRST ATTEMPTED TO REPEAL EXEMPTION.

> "Being an Act to amend the tax laws of this State so far as the same relate to railroad companies; to define the liabilities of such companies to taxation, and to REPEAL SO MUCH OF THE CHARTERS OF SUCH COMPANIES RESPECTIVELY, as may conflict with the provisions of this Act."

By this statute (Acts of 1874, p. 107, Political Code, §780-782) the presidents of railroads were required to return to the Comptroller "the value of the property of their respective companies * * * **to be taxed as other property,**" and the president was required to pay the taxes assessed. But if any company "desired to resist the collection of the tax assessed," the statute provided (Political Code, 782) "that **after making the return,** and after paying the tax levied, and on continuing to pay the same, while the question of liability was being determined, the company might resist the collection of the tax by filing AN AFFIDAVIT OF ILLEGALITY."

The title of this Act of 1874 expressly avowed an intent to **repeal** charter tax exemptions, and, in pursuance of that policy, the Comptroller General for the first time in the history of the State departed from the charter requirement as to taxing the income, and required the President of the Georgia Railroad to make a return of its property for the purpose of assessing a tax for the year 1874. The record

does not show the value of the property of the railroad proper, nor of those comparatively small items like the Clayton Branch, which it is conceded were subject to taxation.

But, inasmuch as the Tax Act of 1874 provided that **the rate should not exceed four mills** (Acts 1874, p. 101), **the property of the railroad must have been valued in excess of the capital of $4,153,000 because the Comptroller, on the return, issued an execution for $23,802.07, being a tax of four mills on $5,950,518.**. (Record, 71.)

For the purpose of resisting said tax in the method declared by the Act of 1874, and still of force under Political Code, §782, the Company filed an

AFFIDAVIT OF ILLEGALITY,

Contending that the attempt in the Act of 1874 to repeal its charter exemption, or to impose other and greater tax than one-half of one per cent. per annum of the net profits of its investment, or to impose a tax on the property in which said stock is invested, was void, because in conflict with the prohibition in the Constitution of the United States against impairing the obligation of a contract. (Record, 72.)

In that case reference was made (Record, 67), not only to the original charter, but as to the Act of 1835 conferring banking privileges; the Act of 1847 increasing the capital stock; Act of 1852 authorizing consolidation with the Washington Branch.

The Judge of the Superior Court sustained the affidavit of illegality as to all the property involved in the present case, on the ground that the Act of 1874 was unconstitutional, in that it impaired the obligations of the contract by taxing property instead of net income.

The Comptroller appealed, and the judgment of the

Superior Court of Fulton County was affirmed by the Supreme Court of Georgia in the case of State vs. Georgia R. R. Co., 54 Ga. 423 (R. 75), holding that:

> The tax on net income provided for in the 15th section of the charter was a valid exemption of the property of the Company from taxation, and formed a part of the contract of incorporation which the Legislature could not repeal by virtue of Art. 1, Sec. 10, Par. 1, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

And further specifically holding that:

> "The Act of 1874 taxing the railroads of this State upon the property belonging to them, as other property of the citizens of this State is taxed, is, so far as the Georgia Railroad Company is concerned, AS TO ITS RAILROAD AND APPURTENANCES, unconstitutional and void."

Another unsuccessful effort was made in 1878 to tax the property instead of income of the Company. Relying on the 15th Section of its charter and the decision of the Supreme Court of Georgia in 54th Ga. 423 (Record, 66), the Company refused to make returns for 1875, 1876 and 1877.

Goldsmith vs. Ga. R. R., 62 Ga. 485.

The Comptroller thereupon assessed it for taxes for those years, and issued executions which were levied on its property (Record, 52). The Company, under the impression that the statutory method of resisting by Affidavit of Illegality was proper, adopted that course instead of filing a bill in equity for injunction (Record, 52). The State demurred (Record, 56), making many of the grounds set up in the present suit. The Judge of the Superior Court overruled

the demurrer (Record, 60), sustained the Affidavit of Illegality, and the Comptroller General appealed (Record, 51).

The Supreme Court held (62 Ga. 491, R., 64) that while there might be a remedy in equity by Injunction, the statutory remedy of Affidavit of Illegality was not available, because that method of defense to tax executions applied only where the railroad company had made a return. The judgment of the Court below was therefore reversed, with direction that:

> "The Affidavit of Illegallity be dismissed for WANT OF JURISDICTION in Fulton Superior Court." (R. 64.)

In rendering the opinion, Judge Bleckley said that while the stock—the original capital—was exempt from taxes, except on the basis of net income, all value in excess of the capital was subject to taxation.

But this was obiter, necessarily obiter, since the Court directed that the proceeding should be dismissed, on the ground that the Superior Court of Fulton County had no jurisdiction. It was universally recognized as being obiter, and no further effort was made to collect a tax on the property of the Georgia Railroad. Annually thereafter, from 1878, for the balance of the century, the Georgia Railroad **was required to pay, and did pay, the tax of one-half of one per cent. on its net profits.**

No one thereafter ever attempted to collect a tax on this property, until 1903, when the Comptroller-General announced his intention to follow up the suggestion of Judge Bleckley in the Goldsmith case (62 Ga. 490; Record, 61), and threatened to collect a tax on the franchise and the value in excess of the stock of $4,156,000. (Record, 5, 38, Amendment, 41.)

PLEADINGS.

Thereupon the Georgia Railroad and Banking Company, on Jan. 7, 1904, filed its bill in the Circuit Court of the United States for the Northern District of Georgia, averring that the Comptroller had threatened to make assessments on the value of the franchise, and $1,999,000 alleged value of the property in excess of the capital of $4,156,000.

The Company prayed that the Court would enjoin the Comptroller from taking such action, and would enter a decree that the Railroad was not liable to taxation on its franchise and property, and that the only tax for which it was liable was a tax not to exceed one-half of one per cent. on the net income of the Company's investment in its railroad. (Record, 5-7.)

THE COMPTROLLER'S PLEADINGS.

Thereupon, on May 12, 1904, the Comptroller filed Exceptions (Record, 10), and on the same day a Plea setting up that the opinion reported in 62 Ga. 485 had construed that the Company was liable to a tax on the property in excess of the capital of $4,156,000, and pleading this opinion as Res Adjudicata.

On the same day (Record, 14) he filed a demurrer on the ground:

1. That there was no Federal question;

2. That there was no equity in the bill;

3. That the Company was liable to a franchise tax, notwithstanding the charter exemption;

4. That the charter did not exempt the franchise and that the accumulated profits were not protected by the charter exemption.

The exceptions, demurrer and Plea were overruled (Record, 34 and 35), and on July 3, 1907, the Comptroller filed his Answer (Record, 36) and amended Answer (Record, 41), in which latter, while admitting that he had demanded a tax on the franchise and on the property in excess of the capital, the Comptroller

SHIFTED HIS POSITION

And for the first time contended that the charter taxed all of the property of the Company, that the exemption was to the stockholders in that it exempted the SHARES of stock. He contended that the charter contract was between the State and the stockholders and not between the State and the Railroad Company.

INTERVENTIONS OF THE COUNTIES OF WILKES AND TALIAFERRO.

In March, 1906, the Counties of Wilkes and Taliaferro (Record, 25-35) filed seperate but identical Interventions, which were ordered to be served without prejudice on the Complainant's Solicitor.

This Intervention alleged that the Washington Branch extended from Barnet in Taliaferro County to Washington in Wilkes County, and

(1) That they were entitled to their proportionate shares of the ad valorem tax upon all property within their

confines, including the Washington Branch, and that the Georgia Railroad had refused to pay tax on this branch, and was due these Counties taxes from 1877 up to date. They alleged that the Company was entitled to no exemption on the branch railroad, or any stock or property held in connection therein, but averred that the same was taxable as the other property in the Counties.

It further alleged that under the Act of 1849, p. 239, the Company was deprived of any exemption which it had under the original charter, and that under the Act consolidating with the Washington Railroad and Plank Company, there was no exemption. (Record, 25, VI.)

(2) That, if the company had had any exemption it was only for the period of thirty-six years from the completion of the main line, which completion it alleged took place in 1845. (Record, 26, IX.)

They prayed that the interlocutory injunction might be revoked or modified so as to permit the Comptroller to issue executions, and that the intervenors be no longer hindered in the collection of their taxes, under the reasons set out therein.

The positions of the intervenors is somewhat anomalous. Their **interventions are not cross-bills; there was no subpoena or relief prayed against the Georgia Railroad**, the only prayer being for the **modification** of the existing temporary injunction, so that the counties might be allowed to proceed to enforce their claim for taxes. They adopted the demurrer of the Comptroller-General, which demurrer takes a position entirely inconsistent with the position assumed in the intervention.

FINAL DECREE.

Both parties plead Res Adjudicata, the Georgia Railroad relying on the decision in State vs. Georgia R. R., 54 Ga. 423 (Record, 15, 65), as holding that the Railroad and appurtenances were not subject to tax, and the Comptroller pleading as Res Adjudicata Goldsmith vs. Ga. R. R., 62 Ga. 485 (Record, 11), in which Judge Bleckley expressed the opinion that property in excess of the capital stock was subject to tax.

The Court, in the course of his opinion, said that the decision pleaded by the Georgia R. R. by an amendment to the bill is Res Adjudicata (Record, 19), but that the opinion in the Goldsmith case, 62 Ga. 485, was not Res Adjudicata, for the reason that the case had been dismissed out of court. (Record, 22.)

Except these two records offered in support of the respective Pleas of Res Adjudicata, no evidence was introduced by either party, the case being controlled by matter of law and admissions that all the property in excess of $4,156,000 "**was produced by natural increase in the value of the property and by renewals, alterations and betterments of the road from time to time by the Company.**" (Record, 43.)

In pursuance, therefore, of the suggestions in the opinion (Record, 24) the decree was prepared (Record, 43), holding that neither the franchise nor the physical property of the road was subject to property tax.

ASSIGNMENTS OF ERROR.

The Comptroller and the two Counties filed eighteen assignments of error (Record, 47-50). Although it will interfere with considering them in regular numerical order, they may be treated in groups.

THE PROVISION THAT THE STOCK OF THE COMPANY SHOULD ONLY BE SUBJECT TO AN INCOME TAX PROTECTS THE PROPERTY OF THE COMPANY AND DOES NOT REFER TO SHARES OF THE STOCKHOLDERS.

Section 15 provides that the stock of the Company after seven years "shall be subject to a tax not exceeding one-half of one per cent. on the proceeds of their investment." It does not refer to stock **in** the Company; nor to shares **of** stock; nor to each **share** of capital stock (95 U. S. 679; 104 U. S. 493; 161 U. S. 134), but it uses the generic word stock.

The Comptroller concedes that there is a difference between "stock" and "shares," and that correctly speaking "stock" means capital. He says, however (Assignments 12-a, 14, 18), that stock **may** mean shares, and that the Court will give it that construction where the context shows that the word "stock" was intended to mean "shares." He then argues that the use of the words "their investments" necessarily refers to stockholders, contending that if it had meant the Company's stock it would have said "its investment."

This argument would be forcible, except for the fact that the word "Company" is uniformly used as a plural noun all through the charter.

In this very Section 15 the word "Company" is used as a plural noun in providing that "the Company shall remain vested with all the privileges as to **their** works."

Sec. 12. "The Company, when **they** see fit, may use **their** exclusive privileges."

Sec. 14. "**Their** exclusive right."

Sec. 9. "By **their** c 29

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a contract subjecting stock to a limited tax on income prevents the imposition of a tax on the property of the company.

In City of Augusta vs. Ga. R. R., 26 Ga. 652, the Court, for the first time, had occasion to construe the provision in the 15th Section of the charter of the Georgia Railroad that after seven years "the stock of the Company should be subject to a tax not exceeding one-half of one per cent. on the net income of their investments," and held (26 Ga., 662, 2) "that this part of the charter means that the stock of the Company, as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock, as the part used in banking, **nor the particulars in which the stock consist, as the land, cars, rails, etc.**"

Again, in State vs. Ga. R. R., 54 Ga. 423, construing an effort to collect a tax on the property, when the charter had provided that the stock was to be subject to a tax on income, the Court held that "the railroad and its appurtenances" were not subject to taxation.

This language of this decision was quoted in Gardner vs. Ga. R. R., 117 Ga. 525.

And again, the same language was construed in Western & Atlantic vs. State, 54 Ga. 429. The Western & Atlantic was incorporated with all the privileges conferred upon the Georgia Railroad. The Court said: "While it was subject to public burdens, the limit of the public burden was one-half of one per cent. on its net income. The company paid this, and was **liable to no more.**"

And again, the same conclusion was reached as to this same language from the Georgia Railroad charter in STATE vs. W. & A. R. R., 66 Ga. 563, where the Court said: "The company is subject to a tax of one-half of one per cent. on its net income, but to no more."

We call attention also to Central R. R. vs. Georgia, 92 U. S. 666; Southwestern R. R. vs. Georgia, 92 U. S. 676; Central R. R. vs. Wright, 164 U. S. 327; Ordinary Bibb County vs. Central R. R., 40 Ga. 646; Central R. R. vs. State, 54 Ga. 411 (4), which cases construe charters passed about the same time and in pursuance of the same policy.

THE FRANCHISES EXEMPT.

When the statute provided that the stock should be subject to an income tax, when it provided that the stock should be taxed on net profits, it **"by necessary implication prohibited"** taxation in any other way (Smith vs. Stevens, 10 Wallace, 321), for "an affirmative statute may imply a negative. * * * Affirmative words which are imperative, and therefore mandatory, imply a negative of anything contrary or alternative to the direction so given." * * *

> Sutherland on Statutory Construction, Sec. 204, Ed. 1891.

It follows, therefore, that nothing except income was to be taxed and no other method of taxation than one to determine the net income could be adopted. For to tax the income was necessarily to tax the property out of which the income arose (Pollock vs. Farmers Loan & Trust Co., 157 U. S. 429).

And inasmuch as the franchise was property helping to produce the income, the same logic which would prevent the taxing of the income AND the rolling stock, would also prevent the taxing of the income AND the franchise.

In considering the Comptroller's contention that while the stock was exempt the franchise was to be taxed, we might begin by asking in the language of this Court:

"And why should there have been limitation? What purpose was there to serve by making a distinction between the forms of taxation? The State did not intend to so limit its aid. It did not mean to help the Bank (Company) to do business, and then tax the business when done—relieve and burden it at the same time; retain the right to impose as an occupation tax that which it gave up as a right to impose as a property tax."

Citizens Bank vs. Parker, 192 U. S., 74.

Of course, the grant of the franchise imposed no obligation on the part of the State to exempt it. The fact that the State gives or sells a franchise to a corporation does not prevent the State from thereafter taxing it, any more than the gift or sale of real estate to the corporation will prevent the land from being taxed.

Metropolitan Rwy. case, 199 U. S. 1.

But, whether given or sold, a franchise is property, "none the less property because it is invisible and intangible."

State vs. Ga. Medical Soc., 38 Ga. 626.

The property may be taxed, and the shares may be exempt. One class of property may be taxed and another may be exempt. The income may be exempt, and the property taxed. But, when stock is exempt, a generic term is used which exempts all the elements of value. Such exemption will include a franchise exactly in the same way that it includes right-of-way, depots, cars, engines and rolling-stock.

"The stock of the company, as stock; as a unit; is alone what is to be subject to the tax; **not parts of the stock as the part** used in banking, nor the **particulars** in which the stock consists; as, the **land, cars, rails, &c.**

"The words seem to require this meaning: "The stock" "shall be subject to a tax." So certainly, do several obvious considerations of convenience. And stock, as stock, is that on which the State tax is always, I believe, levied; so there is analogy too." City Council of Augusta vs. Ga. R. R. & Banking Co., 26 Ga. 662-663.

26 Ga. 662 (2); 66 Ga. 563; 51 Ga. 429; 54 Ga. 427 (4).

And the Franchise Act of 1902, under which this tax is sought to be levied, is eo nomine a **property** tax. It is not an "occupation tax," not a "business tax," not a "license tax," but the Act distinctly treats franchises as property to be "returned and valued in the same way as returns are made by the railroads of their physical **property** * * * and all franchises of value shall be returned for taxation, and taxed as other property."

Acts 1902, p. 37, Secs. 3 and 9.

The word "stock" is comprehensive, and includes all of the elements of value—all of the property which is reasonably needed for the operation of a railroad.

The charter does not particularize. It does not name the right-of-way, nor the rolling stock, nor the franchise, nor power to run the rolling stock over the right-of-way and charge and collect for freight and passenger service. Nor does it contemplate a valuation of some or all of these elements, but it looks to the result of the year's business produced by a combination of real estate, ties, rails, rolling stock and operation under the franchise, and then levies a tax of one-half of one per cent. on the net income. It does not make the items separately subject to this tax, nor try to apportion it, but declares that the stock—that is, the prop-

erty, the plant, the capital—the entire **investment**—shall pay this Income Tax.

> "The capital stock of a corporation represents not only its tangible, but also its intangible property, including therein **all corporate franchises,** and all contracts, privileges and good will of the concern."

Adams vs. Ohio, 166 U. S. 221.

If, then, franchise is property, and if exemption of stock exempts property, it would seem that the franchise of the Georgia Railroad was as much exempt as its other property.

"A general exemption has been held to include the franchise."

1 Cooley on Taxation, 368.

If the stock of the railroad is exempt from taxation, so must the franchise also be.

Nichols vs. New Haven R. R. 42 Conn. 122.

The exemption of the capital stock from taxation operates as an exemption of the franchise.

State vs. B. & O. R. R., 48 Md. 49.
Ann Arundel Co. vs. Annapolis R. R. Co., 47 Md. 592.

Vice versa, a tax on the franchise is a tax on the capital.

Citizens Bank vs. Burton, 10 L. R. A. (n. s.), 948

In Hancock vs. Singer Co., 41 Atlantic, 850 (N. J.), the Court held that a franchise tax was a tax on capital stock, and said that "it is wholly immaterial what name be given

to it. The fact that it is called a license fee or franchise tax cannot validate it. * * * The right to make further exactions from the company under any pretext involves the power to render the grant to the company futile."

Knoxville R. R. vs. Harris, 99 Tenn. 684 (53 L. R. A. 922), is not in conflict with this position. That charter did not exempt stock, and then stop, but it enumerated "capital stock and dividends thereon," suggesting that the word was used in the sense of "shares" as only the stockholder was entitled to the dividend. It exempted "capital stock and dividends thereon, roads and fixtures, depots, workshops, warehouses, etc., etc."

The Court therefore held that "the exemption should be limited to the particulars of the enumeration" and hence held the Company liable to a privilege tax.

But we respectfully submit that Citizens Bank vs Parker, 192 U. S. 83, determines the question. That was a License tax case, although a License fee is not a property tax. (Brooklyn R. R. Co. vs. New York, 199 U. S. 48), this Court held that the charter exemption of capital stock prevented the imposition of a license tax.

The Court cited a decision of the Supreme Court of Louisiana that a provision exempting the capital stock of a bank from taxation at a particular rate, exempted the bank from a license tax. "In other words, it was held that a license tax was virtually a tax on the capital of the bank, and we think that must be held of the tax in the case at bar. Whatever the tax may be called —one on property or one on occupation —if its final incidence is on the capital, it is comprehended in the exemption contained in the charter." (83).

"We think the exemption exists. We deduce this not only from the words of the charter, but from the purpose of its enactment. The bank was made an agency of the State. To have fostered it with aid and to have burdened it with taxation of any kind would have been inconsistent, considering the provisions of the Act incorporating it, and it was immaterial whether it constituted a quasi public corporation or entirely a private one. It was created to accomplish purposes in which the State took an interest, and the expectations which were entertained of it may be regarded in the interpretation of its charter. With the wisdom or folly of the charter, we have nothing to do. Our sole function is to interpret it. It may seem, in 1903, to have been imprudent legislation. But how did it appear in 1833 and 1836? * * * **The scheme was largely hazardous. Private capital had to be tempted to it.** And the State, besides contributing its credit, **offered the inducement of a relief from burdens.** There is no doubt of this, and the dispute is only as to the degree, and on an ambiguity which may be asserted upon a distinction in the form of taxation, a limitation is atttempted to be put upon the comprehensive and expressive words of the bank's charter. This seems to us not justified. The words of the charter are 'the capital of the bank shall be exempt from any tax.' The word 'any' excludes selection or distinction. It declares the exemption without limitation. And why should there have been limitation? What purpose was there to serve by making a distinction between the forms of taxation? The State did not intend to so limit its aid. **It did not mean to help the bank to do business, and then tax the business when done—relieve and burden it at the same time; retain the right to impose as an occupation tax that which it gave up as a right to impose as a property tax.**" 192 U. S. 80-81.

WASHINGTON BRANCH EXEMPT BECAUSE CHARTERED WITH THE PRIVILEGES OF THE GEORGIA RAILROAD.

Neither in his Answer (Record, 36), nor in his Amended Answer (Record, 41), did the Comptroller, who is the Defendant, contend that there was any difference as to Tax Exemption between the Washington Branch and the other property of the Georgia Railroad. That point is only made by the Counties in their Interventions (Record, 25, VI, VIII; 30, VI, VIII), and it is a question as to how far Intervenor's Assignment of Error (Record, 50, 15) can be considered.

1. The Georgia Railroad had a Tax Exemption under its charter of 1833 and did not lose the same by the Act of 1852, p. 120, providing for the consolidation.

2. The Washington Road when chartered (Acts of 1849-50, p. 223, Sec. 12) was granted the privileges conferred on the Georgia by the Act of 1833 and thereby acquired the Tax Exemption of the former, which exemption was not lost by the consolidation.

There is no contention that the consolidation destroyed the Tax Exemption which the Georgia Railroad already had, for,

> "When two companies are authorized to consolidate, the franchises and privileges of each of the constituent corporation continue in full force."
>
> Green County vs. Conness, 109 U. S. 106;
> Central R. R. vs. Georgia, 92 U. S. 665;
> Phila. & Western R. R. vs. Maryland, 10 How. 393;
> C. & O. R. R. vs. Virginia, 94 U. S. 718;
> Southwestern R. R. vs. Georgia, 92 U. S. 677 (construing Acts 1845, p. 132; Acts 1845, p. 116; Acts 1856, p. 187.)

In the absence of restrictive language in the Act of Consolidation, exemptions from taxation contained in the charters of the constituent company inures to the benefit of the consolidated company.

> 6 Am. & Eng. Enc. of Law, 817;
> Southwestern R. R. vs. Georgia 92 U. S. 676-677;
> Tennessee vs. Whitworth, 117 U. S. 145.

Thus, in Georgia, where there was a consolidation between the Central (having an exemption) and the Macon & Western (having no exemption), the Court held that the consolidated company retained the exemption which attached to the Central property.

> Central R. R. vs. Georgia, 92 U. S. 665.

On the merger, therefore, the Tax Exemption of the two constituent companies was continued as to the property formerly held by each. But

3. If by the consolidation a new company was formed, such new company had conferred on it the **privileges** of the Georgia, and such new company thereupon acquired the Tax Exemption.

The charter of the Washington Plank or Railroad (Acts of 1849-50, p. 223, Sec. 12) is exceedingly brief, merely fixing the capital at $200,000, and authorizing the company "to exercise all the powers and privileges conferred by the Act of 1833 on the Georgia Railroad."

This granted to the Washington Road the Tax Exemption conferred by the Act of 1833 on the Georgia Railroad, for

> "Immunity from taxation is a privilege."

Humphrey vs. Pegues, 16 Wall. 244;
Tenn. vs. Whitworth, 117 U. S. 139;
C. & O. R. R. vs. Virginia, 94 U. S. 718;
Southwestern R. R. vs. Ga., 92 U. S. 676;
Southwestern vs. State, 54 Ga., 401,2—407.

WHILE TAX PRIVILEGES MAY NOT BE VENDIBLE, THE WASHINGTON BRANCH DID NOT PURCHASE THE PRIVILEGE, BUT ACQUIRED IT BY CHARTER.

We recognized that Rochester R. R. vs. Rochester, 205 U. S. 250, decides that a Tax Exemption does not necessarily pass to a new corporation under a conveyance of the **privileges** of the other corporation.

But we respectfully submit that the Court was there considering the **assignability of a Tax Exemption—how far it was vendible.** The Court held that the Tax Exemption was not vendible without an explicit statement to that effect; that the Tax Exemption would not pass to a purchaser at foreclosure sale; nor would it pass to a consolidated company acquiring the **privileges** of an existing corporation in pursuance of a consolidating act.

But no such question as this arises under the charter of the Washington Road (Acts 1849-50, p. 223, 12), for the point here is not whether the Washington Road could assign its Tax Exemption by virtue of a consolidating statute, but whether the State **granted** a Tax Exemption when it chartered the Washington Road with the "privileges conferred upon the Georgia Railroad by the Act of 1833."

The Washington charter is very brief. The Legislature adopted the plan then quite common in Georgia of defining its rights and privileges by reference to an existing statute, instead of enumerating these rights and privileges in the Act of Incorporation.

That this was permissable appears from what was said by the Court in Central R. R. vs. State, 54 Ga. 407. From the headnote in that case it would seem that the Court followed the same rules as that laid down in Tenn. vs. Whitmore, 117 U. S. 139, for in Southwestern vs. State, 54 Ga. 401 (2), it said that "the fact that all the rights, privileges, etc., of the Central, as specified in its charter of 1835, were conferred upon the new company by general reference thereto in the Act of 1852, was in legal effect the same as if such rights had been specifically enumerated in the latter Act." This being a unanimous decision is by statute binding in Georgia until expressly overruled is construed in Rochester case 205 U. S. 250 **to mean that tax immunity passed.**

"A statute which authorized the union of two railroad companies, and secured to the united company the 'property, rights and privileges which that law, or other laws, conferred on them (the separate companies), or either of them,' extended to the united company an exemption from taxation in the charter of one of the uniting companies." Tennessee vs. Whitmore, 117 U. S. 145.

Under this view, if the Consolidated Act created a **new** company, such **new** company had the privilege of the old Georgia Railroad, among such privileges being the Tax Exemption.

But if, under the ruling of the Court in Central R. R. vs. Ga., 92 U. S. 672, **no new** corporation was created, but the Georgia Railroad continued with its corporate powers so enlarged as to take in the Washington Branch, then such Washington Branch was exempt by virtue of the provision of its charter and the terms of the Consolidating Act.

Southwestern vs. State, 54 Ga. 401 (2); S. C. 92 U. S. 676, 677.

Tenn. vs. Whitworth, 117 U. S. 139, and Southwestern R. R. vs. Georgia, 92 U. S. 676 (con-

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NAL ISSUE OF $1,500,000, BUT ALL
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Banking Company. These two Acts

together therefore authorize a capital of $4,200,000, to say nothing of the original provision that the "company might increase their stock whenever it became necessary."

It has already been pointed out in the Statement of Facts **that property in excess of $4,156,000 was assessed for taxation in 1874.**

For the Tax Act for 1874 provided that the rate should not exceed four mills on the $100, and four mills on $4,156,000 would have been $16,624, and yet the execution was for $23,207 (Record, 71), being four mills on nearly $6,000,000. When, therefore, the court, in 54 Ga. 423, held that the railroad and its appurtenances could not be subjected to a property tax, **it necessarily decided that the excess beyond $4,156,000 was not taxable, and it also necessarily held that the increase of capital beyond $1,500,000 is exempt.**. (Assignments 4, 12-B.)

> "An exemption of the capital stock granted by charter extends to an increase authorized by subsequent Acts, in the absence of any provision expressly subjecting the increase to taxation."
>
> 12 Am. & Eng. Ency. 359, citing:
> State vs. Norwich R. R., 30 Conn., 290;
> Nicols vs. New Haven, 42 Conn., 103;
> See also State vs. Bank of Commerce, 53 Federal, 735;
> S. C. 161 U. S., 134.

But this increase was authorized by the original Charter Act, 1833, p. 257, §3.

The Supreme Court of Georgia has held that an increase of this Company's stock was exempt. City of Augusta vs. Ga. R. R., 26 Ga. 662 (2).

The original charter authorized the Company to be organized on a capital of $1,500,000, with authority "to enlarge their capital as in the progress of their undertaking they may find necessary." Act 1833, p. 257, §3.

By the Act of 1835, the Company was authorized to increase its capital to $2,000,000, of which $500,000 should be used as banking capital. In 1858 the City of Augusta contended that this bank capital and the real estate in Augusta was subject to taxation.

The Court (26 Ga. 662, 2) said: "We think that this part of the charter means that the stock of the Company, as stock, as a unit, is alone what is subject to the tax; not parts of the stock, **as the part used in banking,** nor the particulars in which the stock consists, as lands, cars, rails."

And again, 26 Ga. 665 (top):

> "We think, then, that the stock **employed in banking is to be considered as included in the expression 'stock of the company,'** and therefore that it is also entitled to the exemption. It was argued that if this was so at first, yet that it had been changed by that part of the Act of 1850 which I have quoted [that no capital stock shall by any construction of this Act be exempt from future taxation at the discretion of the Legislature, and the tax on net profits shall only be on the net profits of the Railroad], but we do not think so. That Act does not at all tax the banking portion of the stock—does not even declare it subject to a tax of any sort. It merely says that no construction shall be put on itself by which IT shall be made to exempt that portion of the stock from taxation at the discretion of the Legislature." 26 Ga., 665 (top.)

THE VALUE IN EXCESS OF CAPITAL OF $4,156,000 IS EXEMPT.

In Assignments 1, 12-B, Record, 47, the Comptroller contends that while the charter exempts the stock of $4,156,000

from a property tax, it does not exempt any value in excess of $4,156,000, even though he admits such excess merely represents the enhanced value of the railroad property. Record, 47 (4, 12-B). A tax on income is a tax on the property out of which the income arises, but the charter contracted that this tax should be measured not according to the value of the property, but according to the amount of the net income. The scheme of the charter, therefore, does not contemplate any ascertainment as to the value of the Company's property, to determine whether it is more or less than $4,156,000, the face of the capital stock.

Confessedly to tax all of the income **and** all of the property is double taxation, and while it may vary in degree, yet it is in principle double taxation to tax all of the income **and** part of the property.

IT HAS BEEN EXPRESSLY DECIDED THAT GEORGIA R. R. PROPERTY, EVEN IF MORE VALUABLE THAN THE CAPITAL STOCK, IS NOT TAXABLE.

But we think the question has been pointedly and authoritatively settled in State vs. Western & Atlantic R. R., 66 Ga. 567 (hot.) which construed the 15th Section of the Georgia R. R. charter—For

The Western & Atlantic Railroad was by its charter given all of the privileges of the Georgia and Central Railroads, except banking powers. The Company paid tax on its net income. The Court held that property not necessary for railroad purposes was also taxable, but that all property necessary and proper for railroad purposes was exempt from any other tax than that involved in the income tax, saying:

> "To make the Company, because it has increased its means of enlarging its income by improving its prop-

> erty, and doubling its capacity, pay taxes on the additional property and additional income, would be to levy a double tax upon the same property. What is necessary to operate the road is necessary to make the income, and when that is taxed, it includes **everything entering as an element going to produce it.**" State vs. Western & A. R. R., 66 Ga. 567 (bot.).

> "The payment of this income tax covers also such property as may be necessary and proper for the use and enjoyment of the franchise secured by the lease of the company, whether it was received from the State or has been purchased since the lease began."

> State of Ga. vs. Western & Atl., 66 Ga. 563;

> See also Western & Atl. vs. State, 54 Ga. 428, that Company having "the privileges of the Georgia R. R." 54 Ga. 429, 436.

And again, in State vs. Georgia R. R., 54 Ga. 427 (4), the Court said that

> "the Company is only exempt on the **value** of its road and necessary appurtenances."

Not value up to the capital stock, not value below the capital stock, "but exempt on the value of its railroad and appurtenances."

But the Comptroller argues that whatever the general rule elsewhere, and whatever the prior decisions in Georgia, the Supreme Court in Goldsmith vs. Ga. R. R., 62 Ga. 485, had expressly declared that the excess over $4,156,000 was subject to taxation, and he pleads 62 Ga. 485 as Res Adjudicata, averring (Assignments 6 and 7) that the Court erred in overruling this plea of res adjudicata.

The Georgia Railroad, in reply, insists that according to general principles, this case is not Res Adjudicata, and

according to the statutes, decisions and settled practice in that State, it is not even binding as a precedent.

62 GA. 485 NOT RES ADJUDICATA.

The decision in Goldsmith vs. Ga. R. R., 62 Ga. 485, adjudged nothing except that the Court had NO JURISDICTION. What was said as to the method of taxing the Company was therefore obiter,—necessarily obiter, for if the Court had no jurisdiction of the cause it had no jurisdiction to decide the rights of the parties. Except for the purpose of ordering the case dismissed, the matter was confessedly **coram non judice.**

> "It requires no argument to show that judgments like these are no bar to the present suit. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of pleading, or the **want of jurisdiction,** or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." Hughes vs. U. S., 4 Wall. 237. R. R. vs. Palmer, 124 Ga. 649, (top).

WHERE THERE IS A CONFLICT IN DECISIONS, THE RULE IN GEORGIA BY STATUTE IS, THAT THE OLDER PREVAILS, AND 62 GA. 485 IS THEREFORE NOT EVEN BINDING AS PRECEDENT.

But even if the Court had retained the case, and had decided that the property in excess of $4,156,000 was exempt, such decision would not be binding as law.

We do not discuss the question as to the effect of two parties pleading Res Adjudicata, and each offering judgments sustaining contradictory contentions. For whatever on general principles would otherwise be the effect of the meeting of such irresistible force and immovable body, the problem in legal physics has been settled by statute.

"In Georgia where there is a conflict between two decisions, the **older** prevails."

Strickland vs. State, 115 Ga. 226;
Boswell vs. State, 114 Ga. 42.

In Calhoun vs. Cauley, 104 Ga., 344, the Court said:

"As a practical question, it is immaterial whether the decison in Darts case is or is not in conflict with that in Parker vs. Hughes, for the case last mentioned is the older of the two, and is therefore, under the terms of our Statute, to be followed as the true law, no motion for leave to review the decision therein rendered, having been made when the case now before us came on for argument. See Acts of 1858, p. 74; Lucas vs. Lucas, 30 Ga., 202, from which it seems clear that the decisions of this Court when rendered by a full bench, should be treated as having the force of Statutes, whether made before or after the passage of the Act of Dec. 9, 1858, the law in 5588 of the Civil Code being copied from this Act."

The Act of 1858, p. 74, declared that:

"A unanimous decision of the Supreme Court shall not be reversed, overruled, changed * * * but shall be observed as the law of this State as fully as if the same had been enacted in terms by the General Assembly."

This was modified by Section 204 of the Code of 1868, so as to permit the case to be overruled by unanimous decision of the Bench. But there was to be no question of construction, for the case could only be overruled on review, and the decision should then distinctly state whether the decision under review was reversed, modified or adhered to.

There was still further modification when the Court was increased from three to six members, the Act of 1896, p. 44, Sec. 5, declaring:

> "The law * * * which declares that a decision concurred in by three judges, cannot be reversed, or materially changed, except by a full bench, is amended so as to provide that a decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, cannot be reversed or materially changed except by the concurrence of at least five judges. Unanimous decisions hereafter rendered by a full bench of six justices shall not be overruled or materially modified except in the manner pointed out in said section, and then only with the concurrence of six justices."

So that the unanimous decision of the Supreme Court in the Augusta case, 26 Ga. 661; State case, 54 Ga. 423, and Western & A. R. R., 54 Ga. 428, defining the words, "the stock shall be subject to a tax on the net income," announce the law of the State governing not only the Georgia Railroad, but compelling a similar construction of similar language in every other charter, until by leave of the Court first had those cases were reviewed, and after review expressly overruled. See Code 1895, Sec. 5588.

These older cases are therefore of higher authority than 62 Ga. 485, and must prevail here.

Not only so, but

54 GA. 423 IS RES ADJUDICATA.

The Comptroller's contention on the subject of Res Adjudicata is anomalous and inconsistent. On May 12, 1904, he filed a plea contending that the decision in 62 Ga. 485, adjudged that the capital stock of $4,156,000 was not subject to a property tax, but all value in excess of that capital stock was subject to tax, and he thereupon plead that judgment as Res Adjudicata, and prayed that the bill be dismissed. (Record 11-12.) And in the 6 and 7 assignments of error, he expressly contends that the Court erred in overruling and not sustaining said Plea.

But when Judge Newman, in his opinion (Record 17), said that the judgment in State vs. Georgia R. R., 54 Ga. 423 "is pleaded by the complainant here by an amendment to the bill, and I think it must be so regarded," the Comptroller took an entirely different position. In assignments 1-8-9-13 he now contends that a judgment as to the taxes for 1874 cannot be used as Res Adjudicata in litigation relating to taxes for the year 1903.

We recognize that in Union & Planters Bank vs. Memphis, 189 U. S. 71, and Covington vs. First National Bank, 198 U. S. 108, this Court held that the effect to be given a judgment by a State Court is a matter governed by State law, and that the Federal Courts are not **obliged** to treat the judgment in a tax case as res adjudicata when offered in litigation involving taxes for subsequent years.

It is admitted that there is a diversity of opinion among the various courts as to how far judgments relating to the taxes of one year may be plead in bar in proceedings between the same parties relating to taxes for subsequent years and that the majority in Georgia R. R. vs. Wright, 124 Ga. 597 (2) held that a tax judgment is no bar as to taxes for subsequent years.

LAW NOT SETTLED IN GEORGIA AS TO EFFECT TO BE GIVEN A TAX JUDGMENT.

But Judge Lumpkin dissented; the law therefore, cannot be said to be **settled,** for while a unanimous decision by the Supreme Court of Georgia "is as binding as an Act of the Legislature (Heard vs. Russell 59 Ga. 54; Georgia R. R. vs. Wright, 124 Ga. 607, Acts 1858, p. 74); and cannot be reversed or materially changed, except by a full bench, and then after argument had, in which the decision by permission of the Court, is expressly questioned and reviewed (Civil Code 5585, Acts of 1896, p. 42), a decision

in which there has been a dissenting opinion is not binding upon the Court in other cases except in so far as a majority may be willing to follow it as a precedent.

The dissent of Judge Lumpkin, therefore, leaves the question open. If then, there is no settled law in Georgia on the subject, this Court can apply the principles of general law laid down in New Orleans vs. Citizens Bank, 167 U. S. 372, and Deposit Bank vs. Frankfort, 191 U. S. 499 and 422.

Whatever the difference between the courts and judges as to the effect to be given a judgment in a tax case, they are, as we understand, agreed that if the "thing adjudged" is the existence of a binding contract, exempting the corporation from taxes, such judgment is conclusive, and may be relied on under a plea of Res Adjudicata in litigation over taxes for subsequent years. New Orleans vs. Citizens Bank, 167 U. S. 372; Deposit Bank vs. Frankfort, 191 U. S. 499, and the Dissenting Opinion, 191 U. S. 522.

The "thing adjudged" in 54 Ga. 423 was that the Company had a contract, and that the general act of 1874, in so far as it attempted to tax its property was void, **not for one year, but for all years.** The judgment was therefore properly receivable as Res Adjudicata.

STARE DECISIS.

But, irrespective of the question as to whether the decision in 54 Ga., 423, will support the plea of Res Adjudicata, the same result will be accomplished under the rule of **Stare Decisis.**

"This is a wholesome doctrine."

Vale vs. Arizona, 207 U. S., 201.

In reliance on the language of the charter, and the repeated decisions of the Supreme Court that the property of the road was not taxable, innocent purchasers have bought the shares of stock for more than half a century. The Augusta case, 26 Ga., 662; the State case, 54 Ga., 423; the Western & Atlantic case (having the privileges of the Georgia) 54 Ga., 429, were all decided **before** the **Obiter** in the Goldsmith case in 62 Ga., 485.

But, **after** the **Obiter** in the Goldsmith case, the Supreme Court, by a unanimous judgment in construing the Charter of the Western & Atlantic (which had the privileges of the Georgia) again declared that only the income could be taxed. —State vs W. & A. R. R. Co., 66 Ga., 567-568.

There is, therefore, every reason for applying and enforcing the rule of **Stare Decisis.** The principle is especially recognized by this Court in this class of cases.—Powers vs. Detroit Ry. Co., 201 U. S., 543-544.

NO DEMURRER TO THE AMENDED BILL ON GROUND THAT COURT HAD NO JURISDICTION.

In logical order, the first question for discussion would have been the first Assignment of Error (R., 47) that the Court was without jurisdiction, but that point is so involved with other matters arising out of the Pleas of Res Adjudicata, that it is here treated, rather than in an earlier part of the Brief.

The Comptroller contends that the Court erred in not sustaining his demurrer to the Bill as amended, because the Amendment setting up the plea of Res Adjudicata presented a non-Federal question, and ousted the Court of jurisdiction. (R., 47-1).

But it is a mistake to claim that there was any Demurrer to the Bill as amended.

The original Bill was filed January 7, 1904. (R., 8.)

On May 12, 1904, the Comptroller himself filed a Plea that the decision in the Goldsmith case, 62 Ga. 485, was Res Adjudicata and established that the excess above the capital stock was subject to taxation.

On the same day, May 12, 1904, (R., 14) the Comptroller Demurred to the Bill on the ground that the Court had no jurisdiction because the parties were all citizens of Georgia and no Federal question was involved, though the Bill only relied on the Constitutional prohibition against Impairment of the obligation of its Charter-contract.

On the next day, May 13, 1904, (R., 15, 65, bot.) the Railroad replied to the Comptroller's Plea of Res Adjudicata by setting up the decision in STATE vs. R. R., 54 Ga., 423, as Res Adjudicata.

But the Comptroller did not object to this Amendment, and did not demur to the Bill as amended.

JURISDICTION NOT OUSTED BY FILING THE AMENDMENT CLAIMING THAT 54 GA., 423, WAS RES ADJUDICATA.

But if as contended by the comptroller, the judgment in a tax case cannot be used as Res Adjudicata; the court was not ousted of jurisdiction by the Amendment.

"The judicial power of the United States extend to "**all cases** in law an equity, arising under the Constitution." (Art. 3, Sec. 2, Par. 1.)

"There is scarcely a case, every part of which depends upon the Constitution." (Osborne vs U. S. Bank, 9 Wheaten, 820) and if the presence of a non-Federal question was suffi-

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TAX EXEMPTIO

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on Statutory Construction, pages

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rland on Stat. Con., Sec. 223.

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or seven years after completion stands
roposition.

he words "after that" shows that there
etween the thirty-six-year grant of ex-
the limitation of the tax to net income,

l periods of time mentioned in the Act:

The Company is given the exclusive right for thirty-six years, **provided** it secured subscriptions, commenced work, and completed the road within the time limit;

After the thirty-six years, the Company remains vested with all its property;

After the road is completed, it is granted an absolute exemption of taxation for seven years;

And "after that"—not twenty-nine years, not for the balance of the thirty-six years, but—after seven years, after completion, shall be subject to a limited tax.

> "To have added shall not be subject **forever** would not have made the meaning any plainer."
>
> Home of the Friendless vs. Rouse, 8 Wall. 437;
>
> Powers vs. Detroit, 201 U. S., 559.

RULE OF CONSTRUCTION.

Recognizing the rule of strict construction applicable to claims of tax exemptions, we ask the attention of the Court to City Council of Augusta vs. Ga. R. R. & Banking Co., 26 Ga. 661, where, in construing this very charter, the Court said:

> "We think it means that the stock of the Company was to be subject to a tax **but not to any to exceeding one-half of one per cent. on the net proceeds of its investment.** Such we think the natural import of the words, and words even in the charter of a corporation conferring valuable franchises are commonly to be taken according to their natural import."

The Rome Railroad case, 14 Ga. 275, is an illustration of the liberal construction adopted by the Court to serve the

legislative intent. There the sentence was incomplete. It provided that:

> "The stock of the Company shall not be liable to any tax only such and no more as is now in banks of this State."

The Courts had to supply omitted words, and thus supplying, make the statute read "that the stock was not to be liable to tax except such tax as is now imposed upon the stock of banks in this State."

This was the construction adopted in order to effectuate the aid and encouragement which the Legislature intended to give.

> "The mode of taxation is of long standing, and, upon the questions of constitutional law, the long settled habits of the community play a part, as well as grammar and logic."

Paddel, 211 U. S., 448.

Calling attention to the fact that the Georgia Railroad was the first road built in Georgia, at a time when the success of such venture was extremely doubtful, and that the Legislature was anxious to "tempt" capital into such an enterprise; that the road was to be built through a wilderness, and was by amendment extended so as to connect with a road then being built by the State with public money, and for the purpose of assisting the State's own enterprise (Acts 1837, p. 212), we feel that we cannot do better than to call the attention of this Court to the language used in Citizens Bank vs. Parker, when the Court held that an exemption of stock was an exemption from license tax.

> "The exemption in the charter includes a license tax. This, for the reasons stated, must be regarded as part of the contract between the State and the bank. And, in reaching that conclusion, the rule requiring a

strict construction of the statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules * * * Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed, which experience has afforded, and which it is the duty of Courts to consider when rights are claimed under a statute."—192 U. S., 85, 86.

In the same connection, we call attention to the argument in Baltimore vs. Baltimore & Ohio R. R. Co., where the Supreme Court of Maryland said:

"It is a matter of notoriety and of history, that in chartering the Baltimore & Ohio Railroad Company, the Legislature and the people of Maryland regarded the completion of the work as a great State object, tending eminently to promote the future wealth and prosperity of Maryland, and particularly the city of Baltimore, and to contribute to the permanence of the union of the United States. They also were duly sensible that this gigantic and patriotic undertaking could not be accomplished but at great expense and hazard of pecuniary loss to its undertakers. As an encouragement to the enterprise, they were willing to confer on it every immunity, privilege and exemption which could reasonably be required, and tend to its completion. In expounding, therefore, those provisions of the charter of the company by which it expressed privileges and exemptions are imparted, liberal rules of interpretation for its benefit ought to be adopted to effectuate the benevolent designs of the Legislature; and not such rules of restriction and limitation as should be applied to the charters of companies incorporated for the peculiar benefit of their stockholders." Baltimore vs. Balt. & Ohio R. R. Co., 48 Am. Dec., pp. 536, 537.

CRITICISM OF THE DARTMOUTH COLLEGE CASE.

Both in the opinion of Judge McCoy, in 54 Ga. 423, and that of Judge Bleckley, in 62 Ga. 485, there are criticisms of the Dartmouth College case.

Judge McCoy said that "in the early history of this country, before the subject was fully understood, it often happened that in a thoughtless hour, with but a nominal consideration, the State is shorn of its most important prerogatives."

But it is respectfully submitted that in making this observation he overlooked the fact that the tax limitation here was long **after** the Dartmouth College decision. The contract was made, not in ignorance of that ruling, but with knowledge thereof and with the intent that such a grant should be a contract which could not be repealed. It was not **thoughtlessly** granted, because the tax privilege was renewed or recognized from time to time by the General Assembly as being binding:

Acts 1835, p. 185 (13);
Acts 1837, p. 212;
Acts 1850, p. 223 (12);
Acts 1850, p. 378;
Acts 1852, p. 120;
Acts 1854, p. 110 (5);
Acts 1858, p. 66.

The members of these various Legislatures knew the conditions before the railroad was built, saw the good it had done, the towns it had built, and the taxable values it had added to the State. They did not regret their trade, by which they had led the subscribers into an enterprise which, if profitable to the Company, was far more profitable to the State.

If there ever was a case in which a Legislature did not act thoughtlessly, this is the case. It first granted and then

renewed these privileges, and it iterated the fact that the property was not taxable, and then reiterated that it was exempt. From time to time, it recognized that the charter exemption existed, and only by the Act of 1874 did the Legislature ever repudiate the grant, and, in that Act, there was no denial of its existence, but the attempt to repeal was itself a recognition of its existence.

Judge Greene, of Pennsylvania, writing of a road built twenty years later, said:

> "Her territory has been vastly improved over the whole length of the road. Great business interests have been established. Towns and cities have been built. Population has largely increased, and a region which was an almost unbroken wilderness in 1852 when the Act was passed, is now a cultivated country abounding with population, pursuing innumerable industries and contributing immensely to the wealth of the Commonwealth, and to the increase of its revenues. * * * The full benefit and advantage of this contract of exemption has accrued to the State."—Com. vs. P. & E. R. R., 30 At. 147.

Respectfully submitted,

JOSEPH R. LAMAR,

for Georgia R. R. & Banking Co.

Office Supreme Court, U. S.
FILED.
DEC 4 1909
JAMES H. McKENNEY,
Clerk.

No. 70.

ADDITIONAL BRIEF FOR APPELLEE

Supreme Court of the United States

OCTOBER TERM 1909

WILLIAM A. WRIGHT, COMPTROLLER GENERAL, ET AL.

APPELLANT

vs.

THE GEORGIA RAILROAD AND BANKING COMPANY

APPELLEE

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

KING & SPALDING,
Of Counsel for Appellee

ALEX. C. KING,
Of Counsel.

ATLANTA, GA.
THE BLOOMER COMPANY
1909

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 268.

WILLIAM A. WRIGHT, Comptroller General, *et al.*, Appellants, vs. GEORGIA RAILROAD AND BANKING COMPANY, Appellee.	Appeal from the United States Circuit Court For the Northern District of Georgia.

BRIEF OF ALEX C. KING OF COUNSEL FOR APPELLEE.

STATEMENT OF THE CASE.

On January 7, 1904, the Georgia Railroad and Banking Company filed its bill in equity to enjoin William A. Wright, Comptroller General of Georgia, from enforcing against it the Statute passed by the Legislature of Georgia and approved December 17, 1902, taxing as a part of its property, its franchises granted to it by its charter and also from forcing it to pay taxes ad valorem upon its entire railroad property constructed under its charter, after crediting said Company upon the assessed value of said railroad, with the sum of $4,156,000.00, the par value of all of its shares of Capital Stock except 440 shares of the face value of $44,000.00. (Transcript pp. 1-8.)

The Company averred that it had paid all taxes owed by it on all of its property other than the said railroads, with their franchises, rolling stock and other appurte-

nances, and that as to this property it had in its charter an irrepealable contract with the State of Georgia, fixing its rate of taxation thereon at the amount of one-half of one per cent. per annum upon the net earnings derived from said railroads, etc., except as to $44,000.00 of said property on which it was bound to pay ad valorem taxes, said amount not being covered by the contract above stated. That it had so returned said railroads and property to the State of Georgia for taxation and the same had been accepted, and taxes paid by it accordingly, for sixty-three years; that it had duly returned all of its property of every kind for taxation for the year 1903 on the above basis, returning its railroads, appurtenances, etc., including franchises, at $4,200,000.00; $4,156,000.00, as taxable to the extent of one-half of one per cent. on the net earnings derived from said entire railroads, appurtenances, etc., and $44,000.00 as taxable ad valorem as other property, returning all other taxable property to be taxed ad valorem, said return being as in former years. That the defendant Wright had refused to receive said return and required a return of its railroads and property, and a separate return, in addition, of its franchises. (Transcript pp. 1-4.)

That on December 17, 1902, an Act of the General Assembly of Georgia was approved which required the return of franchises as property, and the payment of the regular rate of taxation upon the value thereof as property. Such Act provided that the term "special franchise" required to be returned should "include every right and privilege exercised in the State * * * for exercising the power of eminent domain, for the use of any public highway or street and every special right granted for the exercise of any public service, such as the construction and operation of railroads." The return must state the value of such franchises, which are defined by said Act to be property, and are required to be taxed as other property. (Transcript p. 4.)

Complainant offered to pay (and makes a continuing

tender of) the taxes admitted to be due, to-wit, said one-half of one per cent. on the net earnings, as the taxes due on said railroads, etc., (other than said $44,000.00), but said offer was declined and taxes demanded on the alleged excess value of said railroads and appurtenant property above the sum of $4,156,000.00 and also that the franchise be returned at its market value in addition, and the regular ad valorem tax be paid on that. (Transcript p. 4.)

Orator denies liability and insists that its railroads and appurtenant property, including its franchises of the class named in the Act, constitute its stock upon which the charter rate of one-half of one per cent. on the net income is the measure of taxation. That the franchise is not a separate property from the railroads and appurtenances, but an essential indivisible part without which the railroad and property would be of little, if any, value. That it is included in the railroads and appurtenances and constitutes a part of the "stock."

That the demand for payment of said taxes impairs the obligation of the contract made by said charter. That the demand for taxes made by the Comptroller General under the existing laws and under the Franchise Tax Act of 1902 is an effort to double tax petitioner's property.

The law governing the return of the railroads and other property requires its return at its fair cash or market value. This value is dependent upon and includes as its chief item the value given to it as an entity—a railroad—by its franchises. That the requirement of a separate return of these same franchises as property at their value and the payment of the rate of ad valorem taxation thereon is double taxation, unconstitutional, in violation of the Fourteenth Amendment of the Constitution of the United States. (Transcript pp. 6, 7.)

That the return of railroads and their property is required by said Comptroller General at a valuation, proportioned to their market value, in excess of the propor-

tion of like value at which returns of all other species of property are received for taxation. Tax returns of all other property are received for taxation by the State officers at a far lower per cent. of its true market value than the returns of said railroads are required, and taxes are demanded of said Orator on such increased proportion of valuation of the said railroads and property and also now of its franchises as an additional and separate property, thus denying to Orator the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States. (Transcript pp. 6, 7.)

Orator prayed that it be adjudged to be liable only for said tax of one-half of one per cent. on the net earnings of its said railroad (except as to said $44,000.00, and property not appurtenant to its railroads) and not to be liable to a tax on its franchises, and that the defendant be enjoined from collecting from it any greater or other tax. (Transcript p. 7.)

The defendant filed to said bill certain exceptions. (Transcript p. 10.)

These were not insisted on; but the case was first heard on said bill and an amendment thereto and a plea and demurrers interposed thereto. (Transcript p. 16.)

The plea was filed May 12, 1904, and averred that in a certain case between Orator and Goldsmith, Comptroller General of Georgia, reported in 62 Ga. p. 485, the Supreme Court of Georgia had construed Orator's charter exemption to mean that the limit on the State's taxing power extended to all of the capital of the Company except so much as was issued under the amendment of 1868 (Clayton Branch Amendment), 54 Ga. 423. That all of the property of Orator should be returned at the true value just as if it belonged to a natural person and upon so much of this value as equals the amount of the whole capital stock other than that issued for the Clayton Branch, assess at the charter rate, that is, a tax equal to one-half of one per cent. on the net annual earnings of all the Company's investments; upon the

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rate then assess t
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The defendant
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pp. 11, 12.)

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ribed for the Clayton Branch under the charter of 1868, was liable to pay only one-half of one per cent. on its

uled that this construction of the charnion the true construction, regardless t was **res judicata**; and that the stock ncluded the franchises as a necessary rt of the railroads and appurtenances. cted to be entered in accordance with s decision was entered September 29, pp. 16-24.)

906, the counties of Wilkes and Taliain intervention claiming the right to es from complainant. Said interven-

known as the Washington Branch of oad extending from Barnett, on the ferro County, to Washington, in Wilkes was not covered by the exemption tinant, and was subject to county taxes s from the year 1897 to date for taxes id branch respectively in each county. exemption claimed by complainant on other property was to be, under the thirty-six years from the date of the railroad, to-wit, from 1856. That the in the year 1882. Such interventions enors be admitted as defendants to ll and that the injunction granted dant Comptroller General be dissolved him to issue executions for the county intervenors, to be due to them respectention of Wilkes County see Transcript intervention of Taliaferro County see 32.)

tions were allowed filed, without prejrved. (Transcript pp. 28, 32.)

7, said intervenors were without objec-

tion made defendants in said cause and permitted to adopt the demurrers and pleas of the defendant Wright, as their own, and their interventions were permitted to be filed as answers. (Transcript p. 34.)

They thereupon formally adopted, and filed as their own, the demurrers and pleas of the defendant Wright, Comptroller General, as above set forth. (Transcript pp. 28, 33.)

A decree overruling said demurrers and plea was entered July 3, 1907. (Transcript pp. 34, 35.)

The defendant, Wm. A. Wright, on July 3, 1907, filed an answer and an amendment thereto. The answer admitted the facts averred in the Bill of Complaint, paragraphs 1 to 9, inclusive. It denied paragraph 10, but admitted that $4,156,000.00 was paid by subscribers to the stock of complainant which went into purchasing right of way, rolling stock, etc. Defendant averred that other sums derived from earnings and other sources were also thus invested and that the total value of complainant's property was $11,000,000.00, which property he averred was separate and distinct from the shares of stock owned and held by the stockholders. Defendant denied that the stock was invested in said property or otherwise, but averred that it was owned and held by the stockholders. Defendant denied that the proceeds of the stock subscription was invested in the franchise, but says the franchise was a gift from the State. He alleges that the $44,000.00 proceeds of the 440 shares of stock subscribed under the Clayton Branch amendment of 1868, which is admitted to be subject to ad valorem taxation, is of greater value than $44,000.00, to-wit, is worth $118,000.00. Defendant submitted that the complainant's property is all subject to ad valorem taxation and, while admitting that plaintiff's charter contract is inviolable, insisted that the exemption, providing for a tax on net earnings, was only as to taxation of shares of stock in the hands of stockholders, and did not relate to the corporate property.

Defendant admitted the truth of the bill, paragraphs

12, 13, 14 and 15, but denied that the State had not claimed taxes heretofore because admitting complainant's claim. Respondent also admitted paragraphs 16, 17, 20, 21 and 22, inclusive, except that he denied that $44,000.00 was a fair return of property claimed to represent the 440 shares of stock whose investments were taxable at the common rate, and averred said investments to be worth $118,000.00.

Defendant denied paragraphs 18 and 19 of the Bill of Complaint. He denied the allegation of paragraph 24 as to demanding the return of plaintiff for franchise taxation at a higher rate than other property, or that the taxing officers receive the returns from persons other than railroad officials at a greatly lower price or scale.

He admitted that railroad returns must be made as described in paragraph 25, but denied that it would produce double taxation as alleged.

Defendant prayed a construction of plaintiff's charter, and that it be held to mean as follows:

(1) That the exemption of Charter Section 15 is a covenant as to taxing the shares in the hands of the holder and is not a limitation on the taxation of the complainant's property.

(2) That if applicable to the Company it only protects $4,156,000 of its assets and the excess value is subject to ad valorem taxation.

(3) That the word "stock" does not include the element of franchise.

(4) That the $44,000.00 conceded to be taxable should be $118,000.00.

(5) That there is $325,000.00 surplus money shown by exhibit "B" of the complainant's bill, which is taxable.

No cross bill was filed, nor any prayer for relief made; only that the charter be construed. (Transcript pp. 36-40.)

The amendment to said answer averred that complainant's present property, described under tax returns

"Exhibits A and B," except as to roadbed and some realty, was not the property in which the stock was invested; rails and ties had been worn out and changed many times and were now new and heavier; the track is now worth double its original value; buildings have been rebuilt and renewed; new ones have been added, and all of them and their furnishings enlarged; that new and heavier motive power and rolling stock has been added and new tools, appliances and work shops, new and additional side tracks and terminal facilities and yards have been built. The property has been in this way greatly enhanced.

The Civil War destroyed complainant's original property in large degree, and it has been rebuilt at large expense, provided partly from accumulation, partly by the proceeds of said 440 shares of Clayton Branch Amendment stock and partly from the sale of bonds. That in no event should complainant's entire property, at its present value, be exempt from taxes other than said one-half of one per cent. on net income, but the exemption should be construed, and if found to protect any present property all other should be taxed ad valorem and all restraints on assessing and collecting such taxes be removed. (Transcript pp. 41-42.)

This amendment was filed July 3, 1907, and was allowed and considered as a part of the original answer. (Transcript p. 42.)

On July 3, 1907, a final decree was entered, the cause being heard on Bill, Amendment and Exhibits, the answer of Wright, Comptroller, and the amendment thereto, and on the answers of Wilkes and Taliaferro counties. (Transcript pp. 42, 43.)

It decreed that the Act of the Legislature chartering the complainant, to-wit, the Act of the Georgia Legislature of December 21, 1833, and all Acts on the same subject passed before January 1, 1863, were a valid and binding contract between the State of Georgia and the Georgia Railroad and Banking Company. That this charter covered the main railroad line between Atlanta

and Augusta, Georgia, 171 miles, and the branch railroads between Barnett and Washington, Georgia, 18 miles, and between Union Point and Athens, Georgia, 40 miles, and all the appurtenances of said railroads, including their rolling stock, and also complainant's franchises to be a corporation and other franchises, without reference to the value of said property, which it is admitted exceeds by $4,000,000 the nominal value of the capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments from time to time.

Said charter provides a system of taxation therefor, exclusive of all other taxation, of one-half of one per cent. of the net earnings of said property. All property of complainant other than that specified in the decree, including so much of said property as is represented by 440 shares of stock subscribed for under the Act of 1868, is held liable to be taxed under the general laws of Georgia, and an injunction is awarded accordingly. (Transcript pp. 42, 43.)

On January 10, 1909, an appeal was prayed for to the United States Supreme Court, which was granted and perfected. (Transcript pp. 43-46.)

The Errors Assigned Raise the Following Questions:

(1) That no federal question was raised because the decision rendered in favor of the complainant being pleaded by the amendment as an estoppel by judgment, a decision thereon does not call for decision of a federal question, but only the effect of a court decree as **res judicata.**

(2) The bill and exhibits show no exemptions.

(3) The franchise value is not covered by any exemption; it is not stock of the Company.

(4) Because if the charter creates any exemptions it

is only to the extent of the par value of the stock; this was $1,500,000.00 when the Company was organized. It was increased afterwards to $4,000,000.00.

Defendant claims the true meaning of the charter is to exempt $1,500,000.00 from taxation, certainly not beyond $4,500,000.

(5) The Court erred in overruling respondent's plea of **res judicata** because the judgment pleaded was an authoritative ruling and binding upon the parties to this case; the same is a construction of the former judgment and decision set up by plaintiff in the amendment to its bill and relied on as an estoppel, and defines and limits its application, and is binding on this Court, and especially on plaintiff.

(6) That the Court erred in holding the judgment in the case pleaded as **res judicata** by plaintiff to be such, because the same was a judgment in a contest over the taxes of 1874, and is conclusive in Georgia only as to the taxes of that year, and can have no other effect in the federal court.

(7) Because the judgment above relied on was rendered in a case the issue of which was only whether complainant's charter contained a valid contract of exemption from taxation, whether it was irrepealable and whether the Act of 1874 could repeal it. While the present case presents the issues whether the exemption from taxation is of the shares of stock in the hands of the shareholders, or the Company's property; whether the value of such property exceeds the capital subscribed, whether it is not different property from that subscribed, or originally purchased, and if it has not been increased from earnings and the proceeds of bonds; and therefore such judgment is not **res judicata** as to these issues.

(8) Because the judgment is not an estoppel as to plaintiff's liability for taxes on the property in excess of the capital subscribed and that such excess exists.

(9) Because the adjudication that the investment of stock issued under the Act of 1868 is liable to taxation is an estoppel on complainant to the point that all other

investments made since the original charter and since January 1, 1863, are not protected by the charter.

(10) Because the Court erred in not holding that the exemption was of the shares as property of the shareholders, and not of the property of the corporation.

If it exempts such property it can only be construed to exempt property to the extent of the par value of the original stock and all surplus is liable.

(11) Because the Court erred in holding that the "franchises" were exempt as a part of the "stock."

(12) Because the Court erred in holding that the charter established an exclusive way of taxing plaintiff's property.

(13) Because the Court erred in holding the Washington Branch was embraced in the property of plaintiff covered by said exemption and in not holding that it was subject to taxation under the amendments of complainant's charter under which it acquired said branch.

(14) Because the Court erred in holding that said charter exemption did not expire in 1882, but was continuous and existing now. (Transcript pp. 47-50.)

BRIEF OF LAW.

I.

The case at bar presents two Federal questions:

1. The construction of the Act of 1902 taxing franchises as property (Ga. Laws of 1902, p. 37) is sought to be enforced against the Georgia Railroad and Banking Company, so as to subject its franchises to taxation.

The Georgia Railroad and Banking Company insists that it has a charter contract with the State of Georgia which prevents the State from taxing its franchises, and that the effort of the State so to do through this Act of 1902 impairs the obligation of such charter contract.

> **Yazoo & Miss. V. R. R. Co. vs. Adams, 180 U. S. 1.**
> **City Rwy. Co. vs. Citizens R. R. Co., 166 U. S. 558.**
> **Houston & Texas Central R. R. Co. vs. Texas, 177 U. S. 66, 77.**

The Federal Courts exercise an independent jurisdiction to construe the contract, the obligation of which is claimed to be impaired, without being bound by the adjudication of the State Courts as to its meaning, and to determine if the subsequent legislation, as attempted to be enforced by the State, impairs the obligation of the contract so independently construed.

> **Louisville & Nashville Co. vs. Palmes, 109 U. S. 244, 256.**
> **Burgess vs. Seligman, 107 U. S. 20, 33.**

That it is claimed by the plaintiff that the meaning of the contract impaired is **res judicata** does not make the question presented otherwise than a Federal question, and does not impair the jurisdiction of the Federal Court to determine if the obligation of the contract is being impaired, and to protect it against impairment.

> **Stone vs. Bank of Kentucky, 88 Fed. Rep. 383, 397.**
> **New Orleans vs. Bank, 167 U. S. 371.**

2. The question is distinctly presented for decision that the Georgia tax Act of 1902 and the system of taxation therein prescribed as applied to railroad companies deprive said companies of the equal protection of the

law in contravention of the Fourteenth Amendment of the Constitution of the United States.

By paragraph 25 of the Bill of Complaint it is charged that the State, by its Statutes, is taxing railroad companies upon the value of their railroads and appurtenances at their market value, that under the laws of the State such market value includes the franchises specified for taxation by said Act of 1902, as an indivisible part.

That all taxable property in Georgia of every character is constituted by the Constitution of the State a single class and that the Legislature cannot further classify it, and that to double tax railroad property denies to such railroad companies the equal protection of the laws.

See authorities under Subdivision IX of this brief.

That the State is demanding a separate valuation of these franchises at their market value as property under the Act of 1902, and proposes to tax under such Act that value which is included in the valuation of the railroads. (Bill, paragraph 26.)

That this is double taxation of a part of the same class and violates the Fourteenth Amendment. (Transcript p. 6.)

The facts are admitted by the Answer, paragraph 16. (Transcript p. 6.)

Railroad Cos. vs. Board of Equalization, 85 Fed. Rep. 302.
Santa Clara County vs. So. Pac. & Co., 118 U. S. 394.
Kentucky Railroad Cases, 115 U. S. 321, 337.

3. Where a case is brought in the United States Courts, which presents a Federal question, it may also embrace all other matters of litigation between the parties which might have been included in the Bill of Com-

plaint if filed in a State Court, and the Federal Court has jurisdiction of the entire case.

Tennessee vs. Davis, 100 U. S. 257, 264.
Moore vs. McGuire, 205 U. S. 214.
Osborne vs. Bank, 9 Wheat. 738, 823.

II.

Appellant's assignments of error and brief in support thereof incorrectly state the statute relied on as an exemption and incorrectly describe the "stock" or "capital" covered by such exemption.

The assignments of error speak of the "stock of the Company and its branches" as "capital subscribed under said charter." (Assignments 9, 10.) "Original stock authorized and paid in on the faith of the charter," (Assignment 12 b), "stock contributed by the corporators" (Assignment 13). "Money paid in by the corporators" (Assignment 14). (Transcript p. 49.)

The Appellant's Brief states that the meaning given by Appellant to the term "stock of the Company and its branches" is "The value contributed to a corporation by the corporators within the limits fixed by the charter." (See Appellant's Brief, p. 29.)

Appellant's Brief insists that this section of plaintiff's charter which exempts "the stock of the Company and its branches" from all taxation for seven years after the completion of said railroads or any one of them, and provides that thereafter it shall be subject to a tax not exceeding one-half of one per cent. on the net proceeds of their investments," exempts the stock, but not the investments, and uses the two terms as signifying different things. (Appellant's Brief, p. 25.)

The Statute reads as follows:

"The stock of the said Company and its branches

shall be exempt from taxation for and during the term of seven years, from and after the completion of said railroads or any one of them, and after that shall be subject to a tax of not exceeding one-half of one per cent. per annum, on the net proceeds of their investments." Prince's Digest, pp. 307-8.

(a) If it can be shown that the terms "stock of the Company" has a well settled meaning in the Supreme Court Decisions of Georgia, different from appellant's contention, his argument must fall.

This subject has been before the Supreme Court of Georgia a number of times.

In 1853 the Supreme Court of Georgia construed the words "the stock of said Company," occurring in the clause of the charter of the Rome Railroad Company, exempting "the stock of said Company" from taxation. The clause read:

> "That the stock of said Company shall not be liable to any tax, duty, or imposition whatever, unless such, and no more, as is now in banks of this State."

The city of Rome levied a tax on the property of the Rome Railroad Company within its corporate limits. The Company resisted the tax. The lower court held the tax legal. The Supreme Court reversed this judgment, holding,

> "The tax imposed by the city of Rome was upon the property of the Railroad Company. It was not upon the capital stock, nor was the assessment according to the rate at which banks were taxed at the time that the charter was granted."

The Court then quotes the charter as above given and says it is "literally unintelligible." They, however, interpret it to mean

"that the stock of that Company should not be liable to a tax, except such tax as is now imposed upon the stock of banks in this State." "Now by this clause the capital stock of this Railroad is protected from taxation, except in a given rate * * * * It is conceded that the property taxed is such only as is necessary to conduct the business of the Company. It is therefore a part of its capital stock, and as such not taxable as property by the Rome corporation upon an assessment different from that according to which bank stock was taxable."

Rome R. R. Co. vs. Mayor and Council of Rome, 14 Ga. 275, 276.

In 1858 the clause of the charter of the Georgia Railroad and Banking Company, contracting with it in respect to taxation, came before the Supreme Court of Georgia for construction.

City Council of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga. 652.

This case is valuable for several purposes.

1st. It shows that the Act of 1849 providing for issuing new stock and building a branch road to Washington, Georgia, without any tax exemption, was not accepted by the Georgia Railroad and Banking Company, and never became a part of its charter. (Ibid. p. 654.)

2nd. It shows that the Act of 1852 consolidating the stocks of the Georgia Railroad and Banking Company and the Washington Railroad and Plank-Road Company was accepted and the Washington Railroad acquired under the charter, and with all the powers and privileges and under the liabilities and restrictions imposed by existing laws on the Georgia Railroad and Banking Company. (Ibid. p. 655.)

The case arose from an effort on the part of the City Council of Augusta to tax the banking capital of the

Georgia Railroad and Banking Company and its real estate lying in Augusta.

The City Council claimed the right to levy the tax under an Act of the Legislature passed February 1, 1850, providing that no banking capital employed by the Georgia Railroad and Banking Company should by any construction of the charter be exempt from future taxation and the tax on net profits should be only on net profits of the railroad. (Ibid. 659, 660.)

The Court quotes the clause of the charter regulating taxation, and says the question is whether this Act conflicts therewith. Says the Court:

> "Words even in the charter of a corporation conferring valuable franchises are commonly to be taken according to their natural import." (Ibid. 661.)

The Court reaches the following as the meaning of the taxing contract made by the charter:

> "1st. And we think that it means, first, that the stock of the Company was to be subject to a tax, but not, to any tax exceeding one-half of one per cent. on the net proceeds of its investments. * * * * 2nd. We think that this part of the charter means, secondly, that the stock of the Company, as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock as the part used in banking, nor the particulars in which the stock consists; as, the land, cars, rails, etc. The words seem to require this meaning: 'The **stock**' 'shall be subject to a tax.' So, certainly, do several obvious considerations of convenience. And stock, as stock, is that on which the State tax is always, I believe, levied; so there is analogy, too. * * * Stock it is, in reference to which the charter means these things. 'The stock of the Company' shall be subject,' etc. Is the banking part of the stock included in this expression, 'the stock of the Company?'

We think so. That part is stock, and stock of the Company. The use to which it is put can not deprive it of its quality of stock, and stock of the Company. Besides, it appears from the bill that there is no particular portion of the stock set apart and separated from the rest, permanently, to bank on, but that the banking is done on such part as at the time when stock is needed for banking, may be in hand in the form suited to banking."

City Council of Augusta vs. Ga. R. R. & Bkg. Co.
26 Ga., pp. 661, 662, 663, 664.

It will be noticed that there is no suggestion of assessing the property and deducting the par value of the shares of stock therefrom, as that upon which the charter rate of taxation was to be assessed, any surplus value of the stock of the corporation being assessed at the regular tax rate, ad valorem.

In 1869, a case came before the Supreme Court, on the construction of the word **"stock"** as contrasted with **"property"** as being subject to taxation, these words occurring in certain railroad charters given below:

(The volume cited states at page 715 that the head-notes are made by the Judges, unless otherwise indicated. As the Judges render separate opinions, but the head-notes in this case are made by the Court, we quote the head-notes.)

"By the charters of certain railroad companies they are authorized 'to purchase and hold all real estate that may be necessary and proper, for the purpose of laying, building and **sustaining**' said railroads; and when it is declared in said charters, 'that the said railroads, and the appurtenances of the same, shall not be subjected to be taxed higher than one-half of one per cent. upon their annual net income, and no municipal, or other corporation, shall have power to tax **the stock** of said companies,

but may tax **any property,** real or personal, of said companies, within the jurisdiction of said corporation, in the ratio of taxation of like property.' Held, that **all the property** of said companies, that is **necessary** and **proper,** for the purpose of laying, building and **sustaining** said railroads, constitutes a part of the capital **stock** of said companies, and is not liable to be taxed in any other manner than is specified in their respective charters; but that any other property owned by said companies, which is **not necessary** and **proper** for the purpose of laying, building and **sustaining** said roads, and not appertaining thereto, may be taxed by the county, or other corporation, in the ratio of taxation of like property."

The Ordinary of Bibb County vs. Central R. R. & Banking Co. et al., 40 Ga. 646.

This was the state of judicial decision when the case of the State of Georgia vs. Georgia Railroad and Banking Company relied upon by appellee as adjudicating the meaning of its charter arose, and was decided. (For the discussion of this case see Subdivision IV of this brief.)

State of Georgia vs. Ga. R. R. & Bkg. Co., 54 Ga. 423, 427.

"Stock" is an aggregate of the property and effects of a corporation.

State vs. Hood, 15 Rich. (Law) 177.

"The general tenor of the authorities is to the effect that where there is a general exemption of the stock, or capital stock, of a corporation, without other explanatory words, the exemption applies equally to the property of the corporation represented by the shares of stock (citing many authorities)."

Central Railroad, etc., Co. vs. Wright, 164 U. S. 327, 331.

There are no qualifying words in this charter, and it has been construed by the Supreme Court of Georgia to embrace in this exemption the corporate property.

(b) That the words "stock of the Company" does not mean "a sum equal to the sums of money paid in by the stockholders" is perfectly plain from the foregoing.

Such an amount is only an undivided portion of the "stock of the Company" where it represents a portion of the value of its railroads and appurtenances, including rolling stock legitimately needed for its business, with the essential franchises of such company.

If the stock grows in value, it does not cease to be the stock. It simply makes each share of the stock which represents an integral, indivisible ownership in the stock, a representative of more value.

When the stock increases in value it is necessarily because as an earning instrument, the railroad, including its appurtenances and franchises, has been able to earn more money, and, therefore, as the State taxes upon net earnings, the State gets increased taxation, as the stock thus invested becomes more valuable. It goes without saying that what will regulate the value of a railroad, and the value of its stock, will be its capacity for making a net profit, which will go to the shareholders.

But the word stock is used in the sense of the property of the Company. In the case in 26 Ga., above quoted, the City Council of Augusta proposed to tax the banking capital and real estate of that company lying in Augusta.

See 26 Ga. 661.

The Court treats the property held by the Company as being its stock. In that case the effort was made to tax the property used for banking, upon the ground that the exemption related alone to the property used for railroading, but the Court says:

"We think, then, that the stock employed in banking is to be considered as included in the expression, 'the stock of the Company,' and, therefore, that it also is entitled to the exemption."

This is used to exempt the property employed in banking, and clearly shows the meaning of the word stock.

City Council of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga. 664.

Rome R. R. Co. vs. Mayor, Etc., of Rome, 14 Ga. 275.

State of Georgia vs. Ga. R. R. & Bkg. Co., 54 Ga. 423.

(c) The Legislative History of Georgia demonstrates that the purpose of these exemptions was to thereby exempt the railroad and property used in transportation by the several corporations then chartered in order to stimulate the building of railroads, which were then an experiment of doubtful benefit to the builders as an investment, but vastly important to the State.

The Legislative Acts of the State from 1833 to 1839 contain a great number of private charters granted to individuals for the building of railroads.

Prince's Digest of Ga. Laws, pp. 296-277, and subsequent Acts.

The Legislature, in 1834, received and adopted an elaborate report, setting forth the necessity for railroads in the State, the fact that private enterprise was apparently inadequate to the task and that the building of a railroad to connect the interior of the State with the seaboard, even if profitless as an investment, would be of vast benefit to the State, and resolved that the times required the building of such a railroad on the credit of the State "as a great State work."

Ga. Acts of 1834, pp. 288, 291.

In 1835, another report was made to the Legislature and adopted by it on the importance of bringing the railroad from Cincinnati to the South Atlantic in Georgia, and a resolution was adopted employing an engineer to examine the passes of the mountains with a view to accomplishing this result.

Ga. Acts of 1835, pp. 314-318.

In 1836, the State entered upon the work of building a railroad from the Tennessee River (at a point now Chattanooga) to the southeastern bank of the Chattahoochee River (now Atlanta, Ga.), and provided for branches from the southeastern terminus to reach various points in the State, "said railroad to be known as the Western and Atlantic Railroad of the State of Georgia." To induce the building of such branches, she offered to subscribe to stock in companies building the same.

Princes Digest, pp. 355-357.

During the years above mentioned a number of charters were granted containing contracts for limited taxation. The tax to be assessed was in every case one-half per cent. per annum upon the net income of the railroad company.

In some cases the property thus to be taxed was described as "railroad and appurtenances."

Princes Digest, 301, 332, 342.

In some cases as "capital stock (or stock) of said company."

Princes Digest, pp. 317-8, 341.
Ga. Acts of 1839, pp. 105, 108.

The roads thus chartered were to form the system connecting with the Western and Atlantic Railroad.

It is perfectly evident that the Legislature was doing the same thing by the two forms of expression, and understood the words "capital stock (or stock) of said Company" as the same thing as "railroad and appurtenances," and was providing for the same limited tax, to-wit, "one-half per cent. per annum on the net income," on the same property.

The construction of the Georgia courts is therefore but a declaration of the plain legislative intent.

Rome R. R. vs. Mayor, etc., of Rome, 14 Ga. 275.
City of Augusta vs. Ga. R. R. & Bkg, Co., 26 Ga. 651.
State of Ga. vs. Ga. R. R. & Bkg. Co., 54 Ga. 423.

(d) It being settled that by the decisions in Georgia that the "stock of the Company" means the railroad plant, it is equally settled in this state that the railroad plant includes the franchises and that they cannot be severed from it, lawfully, by any judicial process.

If the taxing officers attempted to levy on the railroad as an entity, separate from its franchises, or on the franchises as a property separate from the physical railroad and appurtenances, they are such an indivisible unit that the effort would be unlawful.

Where a judgment was sought to be enforced by selling a part of a railroad, without selling the whole, with its franchise as an entity, the Supreme Court of Georgia held, "Such a sale, though consummated without legal resistance, would be void." (Head-note 4.)

The opinion in the case continues:

> "A chartered railroad is property. The rights and privileges conferred by charter to use it as an instrument of transportation, are also property; for they adhere to it as accessories or incidents, and add to its value. Indeed, they give it its chief value. Without them, the railroad, as such, would be almost, or quite, useless. To own it would be like

owning a horse, with no right to ride him, or drive—no right to put him to labor. This would be owning materials, merely; the iron and timbers, the earth and masonry, of the railroad; or the hide and flesh and bones of the horse."

City of Atlanta vs. Grant, Alexander & Co., 57 Ga. 340, 346-7.

Where a contractor undertook to enforce the lien allowed him by statute on a railroad upon which he does work, by foreclosing it on the portion of such road on which he had worked, in a certain county, the Supreme Court of Georgia held his judgment void, in a contest with the mortgage trustee, because not foreclosing a lien on the entire property as an entity.

Farmers Loan & Trust Co. vs. Candler, 87 Ga. 241.

That an exemption of the "property" of the Railroad Company embraces its franchises is also settled by the decision of this Court.

Wilmington Railroad vs. Reid, 13 Wall. 264, 268.

"What is the stock of a corporation, but its property, consisting of its franchises and such other property as the corporation may own."

Burke vs. Badlam, 57 Cal. 594, 601.

To the same effect are the cases of

County Com'srs vs. Bank, 48 Md. 117, 120.
Scotland County vs. Rwy. Co., 65 Md. 123, 124. . .

All the property of a corporation is the stock.

State vs. Tunis, 23 N. J. L. 546-7.

III.

The Georgia Act of 1902 directs the return of the essential franchises of public service corporations, used in connection with their physical property for taxation and imposes the regular ad valorem tax on such franchises, as "other property." (See Section 3 of Act.)

Ga. Acts of 1902, pp. 37, 39. (Printed in Appellant's Brief, p. 54.)

The franchises are an integral, indivisible part of the property of the Railroad Company, and cannot be separated therefrom without destroying such property.

City of Atlanta vs. Grant, Alexander & Co., 57 Ga. 340, 346.
Morgan vs. Louisiana, 93 U. S. 217, 223.

To say that they are not embraced in the railroad and appurtenances is to ignore facts.

If they are taxable because not a part of the stock of the Company and its branches, as above defined, then we have this anomaly—

When this railroad was in process of construction, without business or earnings, and the stock of the Company and its branches wholly exempt from taxation, the company could have been taxed on the value of this franchise.

When the road stood completed, and the seven-year term of complete exemption of the stock of the Company and its branches was commencing, the Company was liable to pay taxes on its franchises if so required.

If the argument be sound that these franchises are separate property, and not included in the "stock of the Company and its branches," then taxes could have been required at all times and can now be required, regardless of whether the road, with its franchises, is or is not worth the par value of the capital stock, for on this

theory, no matter what the road or so-called stock investment is worth, the franchise is a separate thing and not covered by any exemption.

It is not true, in fact, that money subscribed by the corporators was not invested in these franchises.

The subscribers would not have invested one dollar in a railroad without franchises. The State desired railroad transportation at a time when it was untried. She herself went into the business of building a railroad (Western and Atlantic) and a part of the investment of plaintiff in this case was to extend its main road via Madison to a connection with the State road and furnish it an outlet.

The State offered franchises to induce the investment of the money of subscribers to build a chartered railroad possessed of franchises.

The subscribers paid the company for a share representing an interest in this railroad and franchises which constituted "the stock of the Company and its branches" when the road stood ready to begin business.

It would be a travesty on the State's contract to say she was retaining the right to tax the corporation one-half of one per cent. on the net proceeds of its railroads and appurtenances, as the full measure of permitted taxation on the "stock of the Company," and also to tax **ad valorem** the franchise without the use of which the railroad could earn no income and the stock would lose its chief value.

IV.

This question, however, is settled in favor of plaintiff by the Decision and Judgment in its favor rendered in the case of State of Georgia vs. Georgia Railroad and Banking Company, (Transcript pp. 66-78), pleaded by said Company in this case as **res judicata.**

State of Georgia vs. Georgia R. R. & Bkg. Co., 54 Ga. 423, 427.

That case presented squarely whether the **Company** possessed an irrepealable charter exemption from taxation. If this was a contract with the stockholders and not the Company, as now contended, the **Company** would have owed in 1874 every dollar then demanded.

This decision and judgment, therefore, adjudged that the Company possessed this exemption and that it was not of the stock in the shareholders' hands.

It further adjudged that the exemption of the "stock of the Company covered the value of the road and its necessary appurtenances."

See 54 Ga. supra.

The decisions of the Court, reported in 54 Ga. Reports, as agreed to by all the judges, where rendered, otherwise than by Warner, Chief Justice, are contained in the head-notes.

(See 54 Ga. p. 4.)

The head-notes in this case hold,

"By the Court:

"1. By the original charter of the Georgia Railroad and Banking Company, it was, in terms, provided that 'the stock of said Company and its branches shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that shall be subject to a tax of not exceeding one-half of one per cent. per annum on the net proceeds of their investments.'

"Held: That under the settled rules of construction it was competent for the Legislature to grant this exemption, and forming as it does, a portion of the contract of incorporation, any repeal of it by the Legislature, without the consent of the corporation, is in violation of Art. 1, Section 10, par. 1 of

the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

"2. None of the Acts of the Legislature of this State which have been accepted by the Georgia Railroad and Banking Company passed since the adoption of the Code, have brought said charter, so far as its investment in said road and its necessary incidents are concerned, within section 1636 of said Code of 1863.

"3. The tax act of 1874, taxing the railroads of this State upon the property belonging to them, as other property of the citizens of this State is taxed, is, so far as the Georgia Railroad Company is concerned as to its railroad and appurtenances, unconstitutional and void.

"4. Bonds and other property of said company not forming any part of said railroad or its appurtenances, are subject to taxation as the property of other citizens."

It is clear from these head-notes as well as the opinion of McCay, Judge, that the only taxable property was the investment of the $44,000 stock raised under the Act of 1868, amending the charter, which act was subject to repeal, which investment the Court below had held liable to ad valorem taxation, along with "property in the nature of an investment not within the scope (of the exemption), to-wit, not a part of the road and * * * * the ordinary and usual appurtenances of such an enterprise."

Such a decision is, unless the then rules of law prevailing in Georgia prevented, **res judicata** as to the contract between the State and this plaintiff in other cases arising thereunder.

New Orleans vs. Citizens Bank, 167 U. S. 396.
So. Pac. R. R. Co. vs. United States, 168 U. S. 1-48.

V.

(a) The rule that a decision in a tax case construing a charter should be **res judicata** in subsequent cases arising under such charter, as to the points decided, is recognized by the Supreme Court of Georgia in the case pleaded by appellant, as sustaining his plea of **res judicata.** There Bleckley, Judge, said, speaking of this 54th Georgia (423) case, as deciding that only the Clayton branch stock was taxable and that the charter was irrepealable—"These questions were fairly involved in that case and the adjudication of them there announced ought to be accepted as final."

Goldsmith, Comptroller, vs. Ga. R. R. & Bkg. Co., 62 Ga. 485.

Therefore at the time (28th Sept., 1904,) when the Court below held in this case that the decision in 54th Georgia must be regarded as **res judicata** there was no opposing **dictum** (much less decision) in Georgia, and the case pleaded before him as constituting **res judicata** in the State's behalf by the Comptroller recognized in its **dictum** the 54th Georgia decision as **res judicata.**

Where the State decisions at the time does not prescribe another rule the Federal Court will follow its own views.

Carroll County vs. Smith, 111 U. S. 556.
Great Southern Hotel Co. vs. Jones, 193 U. S. 532.

Subsequent changes of view or subsequent decisions on points not previously settled cannot control rulings made before their utterance, or make them erroneous.

Pease vs. Peck, 18 How. 595, 599.
Morgan vs. Curtenius, 20 Howard 1.
Roberts vs. Bolles, 101 U. S. 119, 128.

(b) But in this case the appellant is estopped from raising the point that a tax decision is not **res judicata** as to the taxes of another year.

The appellant first pleaded, on May 12, 1904, the decision of the Supreme Court of Georgia, reported in 62 Ga. p. 485, et seq. on the taxes of 1878 as **res judicata**. (Transcript pp. 11, 12.)

On May 13, 1904, appellee amended its bill and set up that the decision rendered on the taxes of 1875 was **res judicata** in its favor. (Transcript pp. 14, 15.)

The Court in its opinion is deciding the questions raised by defendant's demurrer and plea and complainant's amendment. (Transcript p. 16.)

This plea and these demurrers are adopted by Wilkes County and Taliaferro County as late as July 3, 1907, the day of the final decree. (Transcript pp. 28, 32.)

These pleas were further presented to the Court by **all** of the defendants and decision asked on this their plea of **res judicata** on said July 3, 1907. (Transcript p. 35.)

No demurrer, exception or answer appears to have been ever filed to complainant's amendment setting up **res judicata** and no contention raised that such decision and judgment were not to be so treated, because a decision on taxes for a particular year.

The first intimation that appellant was not insisting upon the position that a decision as to taxes for one year, involving the construction of a charter contract, was not as to such construction, when properly before the Court, **res judicata**, occurs in appellant's Assignment of Error No. 8 (Transcript p. 48), wherein said appellant has first assigned as error (Assignment of Error Nos. 6 and 7), that the Court over-ruled appellant's plea of **res judicata** based on the dictum occurring in the decision made in a case involving the taxes of 1878, which decision dismissed the proceedings for want of jurisdiction in the Court below to entertain the particular suit for reasons, not affecting the questions raised under the charter. (Transcript p. 48.)

Where, in a tax case, both parties plead decisions of the same Court as **res judicata** upon the same point and invoke the decision of the Court thereon, without either party raising the point that, because tax decisions, they are not **res judicata** in other cases involving taxes of other years, and the Court, both parties conceding by their pleadings, that tax decisions are **res judicata** in other cases as fully as any other character of decision or judgment, determines which decision is **res judicata**, neither party can on appeal urge that the Court erred in so ruling because the judgment in question was rendered in a tax case involving taxes of a different year. The parties are estopped from so doing.

A party cannot take exception to a ruling under which a trial has been conducted that has been procured or acquiesced in by him.

N. Y. Elevated R. R. vs. Fifth Ave. Bk., 135 U. S. 432, 441.
Brooks vs. Laurent, 39 C. C. A. 201.
Hudson vs. Rwy. Co., 101 Mo. 13.
Morrison vs. Atkinson, 85 Pac. 473.

But as shown in paragraphs 2 and 3, the construction given by the Court to the charter is correct, regardless of the point that it is **res judicata** and the opinion of the Court shows he also so ruled the question as **res integra.** (Transcript pp. 16, 22, 24.)

The decree does not adjudge the question as only **res judicata**; but is a broad, general finding. (Transcript pp. 42, 43.)

VII.

Appellee disputes the soundness of the assignments of error 15 and 16, complaining of so much of the decree as holds that the branch road from Barnett to Washington is covered by the original charter of the Georgia Railroad and Banking Company and its tax exemption. (Transcript p. 50.)

The appellee insists that the construction given by the Court to complainant's charter and the amendment, passed in 1852, under which the Washington branch was acquired, is absolutely correct.

1. It is conceded that from 1850 until 1906, when the interventions of Wilkes and Taliaferro counties were filed, the construction that the original charter exemption extended to this branch had been acquiesced in by every department of the State government.

The answer of the Comptroller General, in this case, set up no claim as to the Washington branch being different from any other part of the Georgia Railroad.

The unbroken practice of the departments of government, acquiesced in by the Legislature for a long series of years, is persuasive evidence as to the true meaning of a statute.

Howell vs. State, 71 Ga. 224.
Solomon vs. Cartersville, 41 Ga. 157.
Macon & C. R. R. vs. Little, 45 Ga. 370.
Miller vs. Wilson, 60 Ga. 505.
Wellborn vs. Estes, 70 Ga. 390.
Park vs. Candler, 114 Ga. 501.

2. The several Acts passed by the Legislature incorporating the Georgia Railroad and Banking Company and amending said charter, and especially the legislation respecting (first) building, and (second) acquiring the Washington branch, show that it became a part of

the "stock of said Company," taxable only in the same manner as the other railroads and appurtenances constituting the rest of the "stock."

In 1849 the Legislature passed an Act permitting the Georgia Railroad and Banking Company to build a branch road to Washington, Georgia. This Act provided that the stock issued thereunder was not to be exempted from taxation, (Georgia Act of 1849, p. 239).

This Act was not accepted by the Georgia Railroad and Banking Company.

City of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga. 652, 654.

The bill alleged the Washington branch was acquired under an Act of 1852. (Transcript p. 2.)

This is admitted by the answer of the Comptroller General. See Par. 1 and 2 of said answer. (Transcript p. 36.)

It also appears by admission and decision that all the stock is exempt except that issued under the Clayton Branch Act of 1868. Ans. Par. 5. (Transcript p. 37.)

See also the plea of the defendant Wright adopted by both intervenors which avers the fact to be that the limit on the taxing power extended to all the capital except that issued under the Clayton Branch Amendment of 1868. (Citing to 54 Ga. 423.) The quotation in paragraph 3 of the plea is averred in paragraph 4 to be the true, proper and legal construction of the charter. We deny the conclusion as to method, but admit that only the capital raised under the amendment of 1868 is without the limit. (Transcript pp. 12, 28, 33.)

State of Georgia vs. Ga. R. R. & Bkg. Co., (Transcript p. 75), 54 Ga. 423 (h. n. 3).

(a) The defendants are estopped by the allegation of this plea, which cites by book and page this case as a part of it, from now contending that any amendment

except that of 1868, accepted by the Georgia Railroad and Banking Company, rendered any part of the railroad or appurtenances liable to taxation.

See authorities cited at end of par. V hereof.

(b) The language of the charter of the Georgia Railroad and Banking Company with its amendment, and of the Act of 1852, under which the Washington branch was built, clearly shows that the limit placed on the taxing power by Section 15 of the charter applied to the Washington branch.

See Appellant's Brief pp. 41-50 for these Acts.

The charter reads as follows, concerning said limit:

> "The stock of said Company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them, and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investment." (Transcript p. 2.)

(As to the use of "their," referring to the "Company," see opinion of Judge Newman, quoting from the charter—Transcript pp. 16, 18.)

The entire fifteenth section of the charter (Ga. Acts of 1833, p. 258) is in the following words:

> "Be it further enacted by the authority aforesaid, that the exclusive right to make, keep up, and use the railroads and transportations authorized by this Act shall be for and during the term of thirty-six years, to be computed from the time when said road from Augusta to either of the points herein before designated shall be completed for transportation: **Provided** that the subscription of stock or shares of said company to the amount of at least

five thousand shares, as aforesaid, be filled up within six months from the passing of this Act, and the work from or between Augusta and either of the places hereinbefore mentioned be commenced within two years, and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other railroads for the trade and intercourse contemplated herein: Nevertheless the Georgia Railroad Company shall remain and be incorporated, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep and use railroads over and through such parts of the country that shall have expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right upon such terms as may be prescribed by law, and be accepted by said incorporated Company: The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments." (Transcript p. 66, 67.)

Let it be noted that the grants of every sort made by this Act of 1833 are described as "the estate, powers and privileges * * * * herein granted and secured."

One of these was "the exclusive right to make, keep and use the railroads and transportation authorized by this Act * * * * for and during the term of thirty-six years" after completion. The Georgia Railroad Company shall remain and be incorporated and vested with "all the estate, powers and privileges as to their own works herein granted and secured," "after said term of

thirty-six years shall have elapsed," "except the exclusive right to make, keep and use the railroads," etc.

Among the things granted, and in the same section 15, and thus described as a "privilege" by the Act itself, is the provision exempting from taxation for seven years and limiting the rate after said date.

The Act of January 21, 1852, (Ga. Acts of 1851-2, p. 120), under which the Washington branch was acquired, authorized and empowered the Georgia Railroad and Banking Company and the Washington Railroad and Plank road Company to "consolidate their stocks," and provided that the two companies aforesaid, after the consolidation of their stock should "be known as one corporate body, under the name and style of the Georgia Railroad and Banking Company, and that said corporate body should be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Company, and be under all the liabilities and restrictions, impos[illegible] on the same." (Transcript p. 2.)

This Act uses the same words "powers and privileges" used in the fifteenth section of the charter above quoted, which in that section includes as one of the privileges the limit on the rate of taxation.

It has been so accepted without question, ever since, by the Supreme Court of Georgia.

City of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga. 652.
State of Ga. vs. Ga. R. R. & Bkg. Co., 54 Ga. 423.

The use of the words "powers and privileges" is significant. "Powers" cover the active franchises, what it can do. "Privileges" cover the concessions made to it by restricting other people, or the State, for its benefit.

(c) The Legislature shows by the language used in the amendment to the charter of the Georgia Railroad and Banking Company (Acts of 1849-50, p. 239) which was not accepted, that they used the words "powers and

privileges" as embracing this tax limit of section 15 of the charter. Where it was intended to prevent the Act or amendment from having this result it was expressly so provided. Thus this Act of 1849 expressly provides "that the amount of the increased stock of such company (Washington branch therein provided for) shall not be exempted from taxation as is secured to the present stock by the later clause of the fifteenth section of the charter of said Company, but shall be subject to such tax as the Legislature may hereafter impose."

Georgia Acts 1849-50, p. 239.

The Georgia Railroad and Banking Company having declined to act under this amendment, the Act of 1852 providing for the consolidation, which made the new road, representing the increased stock of the Company entitled to the "powers and privileges" of the Georgia Railroad and Banking Company and put it under that charter, was passed. This new Act did not except this branch from the taxing limitation provided in section 15 of the original charter.

(d) When the Supreme Court in 1875 passed on the claim of the State that the Georgia Railroad was subject to general ad valorem taxation, the Court held that only the investment made under the Act of 1868 was liable. The ground for this decision is also illuminating on this subject.

The Act of 1868 provided for what is called the Clayton branch and enacted that for that purpose the said Company shall have and enjoy all the powers and privileges of the original charter and amendment.

Instead of holding that this language would not have carried the limit on the taxing powers, the Court held that it did have that effect (it was so administered until 1874), but that by force of the Code of 1863, all grants made after January 1, 1863, were repealable and that the Tax Act of 1874 repealed the privilege of tax limitation conferred by said Act of 1868 as to the Clayton

branch, but could not repeal the Acts passed prior to January 1, 1863, and therefore as to **all other** of its railroads and appurtenant properties the tax limitation remained of full force.

State of Georgia vs. Ga. R. R. & Bkg. Co., 54 Ga. 423.

This is made entirely clear by the following comment of Bleckley, Judge, in the case of Goldsmith vs. Georgia Railroad and Banking Company, 62 Ga. 485: "Speaking as to why the increased capital authorized by the Clayton branch amendment is subject to general taxation, 'This results from the general rule that restrictions are repealable if they do not antedate the Code;' and the Railroad Tax Act of 1874 repeals whatever of exemption or restriction is repealable." (Ib. 493.)

The word "privilege" used under such circumstances and in such connection embraces this contract limit on the rate of taxation as a valuable privilege. The two companies were consolidated under the name of the Georgia Railroad and Banking Company. This merged the Washington Railroad and Plank Road Company into the Georgia Railroad and Banking Company, under the latter's charter, and the Georgia Railroad and Banking Company thereafter still possessed, after this enlargement, and in respect to the new branch, the "powers and privileges" conferred, and remained subject to the "liabilities and restrictions imposed on" the Georgia Railroad and Banking Company by the laws chartering it. (Transcript p. 2, par. 7.)

Under this consolidation the Georgia Railroad and Banking Company built the Washington branch. See bill par. 9. Answer pars. 2, 3 and. 4 (Transcript pp. 2, 36.)

It was not a road built by the Washington Railroad and Plank Road Company under its charter which had no privileges therein respecting taxes; it was built by the Georgia Railroad and Banking Company after the

consolidation under the Act of 1852, which consolidation gave it the power to build said road under its charter of 1833, with the powers and privileges and liabilities and restrictions which by its charter applied to its previously built branches; one of these privileges was the right as to taxation therein contained.

Conceding that the word "privileges" does not necessarily carry with it exemption from, or contract in respect to, taxation, we insist that under the rule in Georgia, and in the light of the language used in the charter and amendments, of the Legislative, Executive and Judicial history in respect thereto, that this charter falls under the line of cases which hold the words "powers and privileges" to include tax exemption, or restriction.

The South Carolina Legislature, chartering the Cheraw and Darlington Railroad Company, enacted as follows:

> "That all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein named."

This Court comments upon the fact that,

> "All the 'privileges,' as well as the powers and rights of the prior Company, were granted to the latter. A more important, or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined."

The opinion comments upon the fact that the history of the legislation serves to show that it was the purpose to induce the building of the road, by extending all the benefits which the former Company enjoyed.

Humphrey vs. Pegues, 16 Wall. 244, 247.

We also call attention to the decision in the case of

Tennessee vs. Whitworth, 117 U. S. 139, 145, 146.

It will be noticed that we are not dealing here with the transfer of a right from one person to another. It is quite clear that exemption from taxation, or a contract as to restricted taxation, is a personal privilege, and therefore that it is not presumed to be extending beyond the immediate grantee, without language making this clearly apparent; but here is the same person to whom the personal privilege was granted, in respect to its railroad, and the branches authorized to be built by its original charter. It is subsequently authorized to consolidate with another company, but the consolidation is not to work a new corporation, but to be under its own original charter, and it is to possess all of the powers and privileges of its original charter, and be subject to the liabilities and restrictions of such charter, in regard to the new branch which it may build, after the consolidation.

It does, subsequently, build another branch under this authority. No word of restriction as to which of its privileges is referred to is contained in the grant. We, therefore, insist that under the authorities aforesaid, and especially in the light of the history above given, the privilege in regard to taxation covered the Washington branch.

VIII.

The position that the provisions of section 15 ceased after the expiration of thirty-six years from the date of completion of the road is wholly unwarranted:

1st. The officials of the State in every branch of the Government of Georgia have unanimously heretofore acted upon the opposite view, to-wit: That the exclusive right of transportation lasted for said thirty-six years and that thereafter every other grant made, including the contract as to tax rate to be imposed, runs with the life of the charter.

Because a charter contains a contract respecting taxation and **in case of any ambiguity** is to be construed most strongly against the claim of exemption, words are not to be understood otherwise than in their plain and usual sense. They mean, and are presumed to mean, the same thing in a charter, and in the tax clause thereof, that they mean anywhere else, unless the Statute repels this presumption by declaring or disclosing that they are used in a peculiar sense.

In respect to this section 15 of this charter, the Supreme Court of Georgia has said:

> "Such, we think, the natural import of the words; and words, even in the charter of a corporation conferring valuable franchises, are commonly to be taken according to their natural import."
>
> **City of Augusta vs. Ga. R. R. & Bkg. Co., 26 Ga. 661.**

This statute neither declares nor suggests that the words relating to duration of this privilege respecting taxation are used otherwise than, as the law presumes, to-wit, in their usual sense.

Section 15 of the charter declares that after the term of thirty-six years during which the Company is granted an exclusive right to maintain and use railroads between certain points has expired. "**Nevertheless,** the Georgia Railroad Company shall remain and be incorporated and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep and use railroads over and through such parts of the country, that shall have so expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right on such terms as may be prescribed by law and be accepted by the Company: The stock of the said company and its branches shall be exempt from taxation for seven years from and after the completion of the said

railroads and either of them; and after that, shall be subject to a tax, not exceeding but one-half per cent. per annum on the net proceeds of their investment."

Prior to the adoption of the Code of Georgia in 1863, all charters granted without limit of duration created corporations with perpetual existence.

Cent. Ga. Ry. & Bkg. Co. vs. State of Ga., 54 Ga. 402, 404, 420, 422.

This charter then in section 15 provided that the Georgia Railroad and Banking Company was incorporated, and vested with all of its estates, powers and privileges in perpetuity with an exemption from all taxation for seven years after the completion of its railroads or any one of them and a contract for taxation on its roads and appurtenances thereafter during the perpetual existence of the corporation, the only exception to this continuance of all powers and privileges being that the exclusive right to use its railroads and transportations was limited to thirty-six years; but even this could be renewed by the Legislature on new terms.

It is therefore clear that this privilege as to taxation lasted with all the other privileges, except the exclusive right aforesaid, for the perpetual life of the corporation.

IX.

The taxation required by the laws of Georgia, and proposed, is to tax, at its market value, the railroads and appurtenances of complainant. This market value must and does include the value conferred by the franchise. Bill paragraphs 25 and 26. (Transcript p. 6.)

City of Atlanta vs. Grant, Alexander & Co., 57 Ga. 340.

It is also required by the Act of 1902, and proposed, to value separately and tax separately, at its market value as property, these franchises. Comptroller's Answer, paragraphs 16 and 17. (Transcript p. 39.)

> "Said franchises shall be taxed at the same rate as other property upon the value thereof as returned, or, if the value returned is not accepted, upon the value as above ascertained (in all particulars as are now provided by law in the case of returns made by railroads of their physical property) the said tax to be levied and collected as now provided in the case of the property of railroad companies."

Ga. Acts of 1902, p. 37. Appellant's Brief, p. 54.

> "Property, subject to be taxed, is treated (by the State Constitution) as one single class, and the only division of it contemplated is by territorial lines coinciding with the territorial limits of the various authorities by which the taxes upon it are levied. * * * * Thus the only classification of property relative to taxation that is made, or authorized, is into exempt property and property subject to be taxed; and taxation on all property subject to be taxed is required to be ad valorem."
>
> "Once for all, the Constitution has enumerated the two classes of property, which enumeration the legislature, the courts and the citizen must recognize as exhaustive; property whatever its species, is simply exempt or subject to be taxed. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value. The result will be, in every instance, that all persons who own taxable property of equal value will pay the same amount of taxes, and all who own more than others will pay more, and all who own less will pay less."

Verdery vs. Village of Summerville, 82 Ga. 138, 139, 140.

This case is cited, approved and followed in numerous cases.

Mayor, etc., of Savannah vs. Weed, 84 Ga. 683, 687.
Ga. B. & L. Assn. vs. Savannah, 108 Ga. 63, 67.
Brown vs. So. Rwy. Co., 125 Ga. 772, 775.

The property subject to be taxed which constitutes one class embraces "property of every kind, real estate, money, choses in action, movables."

Ga. B. & L. Assn. vs. Savannah, 108 Ga. 63, 67.

The exempted property is enumerated in the Constitution, and any other exemption, either direct, or by taxing some property and refraining from taxing other property, is unconstitutional.

Verdery vs. Summerville, 82 Ga. 138, 140, 141.

"All property or other thing of value, subject to taxation, must be given in by the tax payer, as hereinafter set forth, at its fair market value, and must be taxed according to its value," etc.

Code of Georgia (1895) Vol. I, Sec. 770.

"The presidents of all the railroad companies * * * * in this State shall be required to return, on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the state," etc.

Code of Georgia, Vol. I, Sec. 780.

The tax on franchises in Georgia is not like the tax usually called a franchise tax, to-wit, of that intangible value, above, outside of, and beyond the value of the property. The Act expressly excludes "the mere right to be a corporation," and includes the right granted by counties or cities to public service corporations to occupy roads or streets, a property easement. It treats of the franchises taxed as "property." In the case of railroad companies they are those incidents of their railroads which pass with them by judicial sale and give them their value.

> Adams Express Co. vs. Kentucky, 166 U. S. 171, 180.

> "The rights and privileges conferred by charter to use it (a railroad) as an instrument of transportation, are also property; for they adhere to it as accessories, or incidents, and add to its value. Indeed, they give it its chief value. Without them the railroad, as such, would be almost, or quite, useless. * * * * This would be owning material merely; the iron and timbers, the earth and masonry of the railroad."

> City of Atlanta vs. Grant, Alexander & Co., 57 Ga. 340, 346.

A tax on property, which does not cover all of the property subject to be taxed within the territorial limits of the authority levying the tax, and subject it to **equal ad valorem** taxation, is discriminatory and unconstitutional.

> **Brown vs. Southern Rwy. Co., 125 Ga. 772, 774, 775.**

The Constitution of Georgia, therefore, throws around every tax payer the protection of the law that on all

property he shall pay taxes upon a like valuation at the same rate and in the same way.

Gilman vs. City of Sheboygan, 2 Black, 510, 517.

The Act of 1902, in its application by the Comptroller General to the taxation of railroad franchises required to be returned for taxation thereunder, and to be taxed as "other property," requires the same property to be returned for taxation as property, and to pay taxes ad valorem, twice, once as the integral part of the railroad, "that which gives it its chief value," and again as separate property, at its "fair market value," and requires this portion of the one class created by the Georgia Constitution, to-wit, owners of taxable property, to pay taxes twice on the part of the single class, to-wit, "property subject to be taxed" which they own, while all other members of that class return and pay single taxes. By this Act and its enforcement, the State denies to these selected property tax payers the equal protection of the law.

Railroad Company vs. Board of Equalization, 85 Fed. R. 302, 317.
Santa Clara County vs. So. Pac. Co., 118 U. S. 394.
Kentucky Railroad Cases, 115 U. S. 321, 337.

The Act also offends the State Constitution in regard to uniformity of taxation, and should be so held.

Mich. Centr. R. R. vs. Powers, 201 U. S. 245, 291.

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Of Counsel.

WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA, *v.* GEORGIA RAILROAD AND BANKING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 70. Argued January 11, 1910.—Decided February 21, 1910.

A special charter to a railroad corporation contained a provision of exemption from taxation as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding one-half of one per cent. per annum, on the net proceeds of their investments," in construing this provision held that:

The words "after that" are equivalent to the word "thereafter" and relate to the entire period of time after the expiration of the seven years of total exemption, and are not to be construed as limited by another provision in the charter for a definite period during which the corporation should have exclusive rights.

The capital stock of a corporation is the capital upon which the business is to be undertaken and is represented by property of every kind acquired by the company, while the shares are mere certificates representing a subscriber's contribution to the capital stock and measuring his interest in the company. This distinction is obvious, although the words "stock" and "shares" are sometimes used synonymously.

The stock exempted in this case was the capital or property of the corporation and not the shares of stock in the hands of the stockholders.

The Federal courts accord to a judgment of the state court only that effect given to it by the courts of the State in which it was rendered; and where the highest court of a State has held that a judgment in

a tax suit is not *res judicata* in a suit for taxes subsequently assessed for another year, even though it must be decided on the same questions, this court will regard such a decision only as an authority and determine the question on its merits.

Where the capital of a corporation is exempted from taxation, except as specified, the exemption continues even if the property appreciates in value; and where, as in this case, it is evident that the legislature intended that the taxation of the corporation should be measured by the income, the exemption will not be construed as limited to the then value of the property so that natural increases in value will be subject to any other method of taxation than that stipulated in the charter.

A law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract.

An act of a state legislature attempting to tax the whole or any part of the capital or franchise of a corporation, whose charter contains an express limitation and method of taxation such as in this case, by any method other than that specified therein, impairs the obligation of the charter and is unconstitutional under the contract clause of the Federal Constitution.

A state statute authorizing or directing the grant or transfer of the privileges of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity in the grant or transfer. *Rochester Railway Co.* v. *Rochester*, 205 U. S. 236, 252.

While an exemption from taxation enjoyed by a corporation which acquires the franchises and property of another corporation may not be affected as to property which it already possesses, such exemption does not apply to additional property so acquired, nor do the exemptions enjoyed by the corporation whose property and franchise are acquired pass to the purchasing corporation.

The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

Where the decree is affirmed but modified as to a substantial contention the costs of the appeal will be divided.

THE facts are stated in the opinion.

Mr. Samuel H. Sibley and *Mr. John C. Hart*, with whom *Mr. Hooper Alexander* was on the brief, for appellant.

Mr. Joseph B. Cumming and *Mr. Joseph R. Lamar*, with

whom *Mr. Alexander C. King*, *Mr. Boykin Wright* and *Mr. Ligon Johnson*, were on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill to restrain the enforcement of certain taxes imposed by the State of Georgia, which the railroad company claims to be in violation of a contract between itself and the State. The court below sustained the contention of the railroad company, and held that the scheme of taxation found in the charter of the company was of inviolable obligation and enjoined any method of taxation conflicting with the stipulations of the charter; from this decree the comptroller has appealed.

The charter in question was granted by the State of Georgia in 1833, a time long before the imposition of any restriction upon the power of the legislature of that State to stipulate for either an entire or partial exemption from taxation. It is, therefore, not denied by the State that the charter constitutes a contract which may not be impaired by subsequent legislation. In view of this concession we are only called upon to decide the extent of the charter exemption, and, incidentally, its duration.

The controlling section of the charter is the fifteenth. The part now relevant is as follows:

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding one-half of one per cent, per annum, on the net proceeds of their investments."

The period of absolute exemption has, of course, long since passed. The only question is as to the duration and extent of the partial exemption which followed.

That the property exempt altogether for seven years is the same property subject to a limited tax thereafter was long

ago decided by the Supreme Court of Georgia in a case which involved the interpretation of this very contract. *City Council of Augusta* v. *Georgia Railroad & Banking Company*, 26 Georgia, 651, 661 *et seq.* The question in that case was as to the legality of municipal taxes assessed by the city of Augusta upon that part of the capital of the company employed in its banking business and upon real estate situated in that city. The taxes were held illegal. Interpreting this section, that court said:

"It means, first, that the stock of the company, was to be subject to a tax, but not to any tax exceeding one-half of one per cent on the net proceeds of its investments." Second, "That the stock of the company, as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock as the part used in banking, nor the particulars in which the stock consists; as, the land, cars, rails, etc." Third, "That this tax to which the stock is to be subject, is to be a tax to be laid by the State."

We may as well turn to one side just here to deal first with the question of the duration of this commuted tax which is to follow the period of tax exemption, because we construe the words "after that," which immediately follow the exemption clause, as synonymous with "thereafter," and as fixing the time when that property which was theretofore exempt should be subject to the system of taxation provided by the succeeding clause.

It has been rather faintly urged that the duration of this commuted tax or partial exemption was limited to a term of thirty-six years after the completion of the railroad, and that this period has long since expired. This suggested limitation seems to have no other basis than that the words "and after that" do not mean "thereafter," as we have assumed, nor refer to the limitation immediately preceding, but to a more remote limitation found in the second section of the charter, and again in the earlier part of the fifteenth section. But the thirty-six year limitation is one obviously applicable

only to the grant of an exclusive right, within a defined territory, to construct and operate railroads. This was intended to protect this pioneer railroad from being paralleled within that time. The recurrence to this exclusive right in the first part of the fifteenth section is only for the purpose of placing a condition thereon which, as matter of fact, never happened, and which, therefore, never became vested, and to provide that the termination of that right should not otherwise affect the corporate existence, estate, powers or privileges of the company. This reference to the exclusive right conferred first by the second section is followed by the provision above set out, providing that "the stock of the said company and its branches shall be exempt from taxation for and during seven years from and after the completion of said railroads, or any of them, and after that shall be subject to a tax not exceeding one-half of one per cent per annum on the net proceeds of their investment." "After that" obviously refers to the last limitation, the termination of the exemption period, and it would be an indefensible construction to construe the words as referring it to the thirty-six year limitation of the exclusive right regulated by the preceding part of the same section.

Coming now to the question as to what is the meaning and scope of the partial exemption found in this clause, we are confronted, first, with the contention that only the shares in the hands of shareholders are within either the first or second clause of this contract, and that the entire property of the company is subject to the taxing power of the State, unaffected by any contract for any stipulated form of limited taxation. This claim is, of course, bottomed on the contention that "stock of the said company and its branches" refers to and means only the shares in the capital stock held by the shareholders, and that the benefit of the stipulation was intended for the shareholders in their character as such.

The word "stock" is not uniformly used to designate the capital of a corporation although its primary meaning is capital, in whatever form it may be invested. Indeed, it is

not at all unusual to find the word used synonymously with "shares," and meaning the certificates issued to subscribers to the company's stock. It is therefore important to look at the connection in which the word is used when an exemption or substituted method of taxation is involved, to see whether the legislative intent was to exempt the capital of the company, in whatever form invested, or the shares of stock in the hands of the shareholders. *Powers* v. *Detroit & Grand Haven Railway*, 201 U. S. 543, 559. There is an obvious distinction between the capital stock of an incorporated company and the "shares" of the company. The one is the capital upon which the business is to be undertaken, and is represented by the property of every kind acquired by the company. Shares are the mere certificates which represent a subscriber's contribution to the capital stock, and measure his interest in the company. The charter, plainly enough, recognized this. Thus, in the third section, it is provided that "*the stock* of the company . . . shall consist of fifteen thousand shares of one hundred dollars per share, and *the said company to be formed on that capital*." By a later section the times and places for taking subscriptions are defined, "so that on summing up the whole it may appear whether *the stock* is filled up, *or falls short of the aforesaid capital*." In the seventh section we find the interest of the subscribers to the "stock" recognized and described as shares, while the capital of the company in which he holds such shares is described as "the stock of the said company." Thus each subscriber is given "a number of votes equal to the number of *shares* he may hold in the *stock* of the company." That "stock," as used, means "capital" in whatever form invested, appropriate to the purpose of the company, is also plainly evidenced by the provision that after the total exemption period this stock shall be subjected to a specific tax "on the net proceeds of their investments." It has been suggested that by "their investments" was meant the investments of the shareholders in the company's stock. This interpretation is based upon

the use of the plural "their"; but in many places in this same charter the company is referred to in the plural. As this same act provides for the organization of one or more companies to construct branch lines, and extends to them the same tax exemption, it is grammatically correct to read "their" as referring to this plurality of companies. That "stock" in the first clause means capital, and "their investments," the property into which the company's capital has gone, seems in any view you take of it the most rational interpretation of the matter. That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter. Aside from at least sixty years of legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, there has been a series of cases decided by the Supreme Court of Georgia which involved the meaning of this clause. In each case the court has held, either, that the whole of the capital was exempt in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock. *City of Augusta* v. *Georgia Railroad & Banking Company*, 26 Georgia, 651, 662 *et seq.*; *The State of Georgia* v. *Georgia Railroad & Banking Company*, 54 Georgia, 423; *Goldsmith, Comptroller &c.*, v. *Georgia Railroad & Banking Company*, 62 Georgia, 485.

In the case of *State of Georgia* v. *The Georgia Railroad & Banking Company*, cited above, the court held that the act of 1874, which sought to assess an *ad valorem* tax against the property of the railroad company was void, as in violation of the obligation of a contract by which the State was limited to a tax which should not exceed one per cent "on its earn-

ings." *Goldsmith, Comptroller,* v. *The Georgia Railroad & Banking Company* is relied upon as overruling the earlier case. But this is a mistake for more than one reason. That case was dismissed for want of jurisdiction over the subject of the legality or illegality of the tax resisted. Hence, all that was said about the taxability of the appellee's property under this charter exemption was *obiter*. But so far as the question of the applicability of this partial exemption to the capital of the company as invested in its railroad is concerned, the opinion distinctly accepts the former case as a settlement of the question. Referring to the former case, Mr. Justice Bleckley said:

"It seems to have been the purpose of this court to hold in 54 Georgia, 423, that except as to stock issued under the amendment of 1868 authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad and Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final."

That Mr. Justice Bleckley afterward concluded that the former case had not considered or decided whether any excess of value of property over the amount of the authorized and exempt capital would be subject to an *ad valorem* tax is true; but that does not detract from the recognition of the former as an authoritative opinion upon the point that the exemption was of the capital of the company.

We come now to the question as to whether so much of the value of the company's railroad and appurtenances as exceeds in value the amount of the authorized capital stock, under the charter and amendments prior to 1863, is subject to taxation as other property of like character, under the law of the State. This value "it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said company," which excess, it is further conceded, has been "the

result of natural increase in the value of said property and by renewals, alterations and betterments of the same, from time to time, by said company."

That this is the true and proper method of taxation admissible under the charter exemption has been urged upon several grounds. First, it is said that this construction was given this very charter in *Goldsmith, Comptroller*, v. *Georgia Railroad & Banking Company*, heretofore cited, and the appellants plead the judgment in that suit as *res judicata*. Confessedly, if this is a good plea, it must operate not only for the purpose for which it has been interposed, but will be entirely fatal to the claim that the exemption now in question has expired or that it extended only to the shares in the hands of shareholders.

The opinion in that case does so construe the exemption, but, as we have already shown, the case went off wholly upon the question as to whether the trial court had any jurisdiction of the question, and the opinion, after construing the clause here involved, passed on to this matter as to whether the question could be made under the statutory remedy resorted to by the company, and concluded by holding that whether the railroad company had been taxed illegally or not, the court below ought to have dismissed the proceeding for want of jurisdiction, and that the remedy, if any, was by bill in equity. Accordingly the judgment which the Supreme Court entered was one which reversed the judgment below and directed that the proceeding be dismissed for want of jurisdiction. This judgment in no way involved the construction of this exemption contract, nor the liability of the Georgia Railroad Company to taxation upon its property, or otherwise, and does not therefore have any efficacy as an estoppel. There was therefore no error in the ruling of the Circuit Court that this plea was bad. Upon the other hand, when the plea of estoppel just disposed of came in, the complainants amended their bill and set up the judgment in the earlier case of the *State of Georgia* v. *The Georgia Railroad & Banking Company*,

54 Georgia, 423, as an adjudication concluding not only the claim that the exemption was only of the shares in the hands of shareholders, but as an adverse decision of this claim that only so much of the "investments" of the company were exempt from a general *ad valorem* tax as equalled in value the authorized capital stock of the company under the charter and amendments prior to 1863.

But in *Georgia Railroad & Banking Company* v. *Wright*, 124 Georgia, 596, the Supreme Court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must be also decided.

This court, as is well settled, accords to a judgment of a State only that effect given to it by the court of the State in which it was rendered. *Union Bank* v. *Memphis*, 189 U. S. 71; *Covington* v. *First Nat. Bank*, 198 U. S. 100.

We shall therefore disregard this plea, and determine the matter upon its merits, giving to the decision of the Georgia court consideration only as an authority.

Coming then to the question on its merits: Under the original charter and certain amendments there exists to-day an authorized capital stock of $1,156,000. This leaves out of account a small increase under a later act, aggregating 440 shares, which capital is subject to taxation and is not now in dispute. The railroad property, including its railway, depots, equipments and appurtenances proper, have a present value of some four millions of dollars in excess of the authorized capital. Now the contention is that to the extent of this excess the property of the company is assessable and taxable as other property. There is not much to be gained by the reference to *Farrington* v. *Tennessee*, 95 U. S. 679, 687, and *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 137, where something is said in an argumentative way about the taxability of a bank's surplus whose capital was exempt. That

might well be if the bank should choose to enlarge its actual capital in the business by using profits as capital instead of distributing them as profits to the shareholders, where the exemption was of a specific amount of capital. The facts in this case are so different from the case presented of a bank's surplus as to make the illustration of little value, even if it was settled that in all cases a bank's surplus would be taxable although its capital was exempt. We have here nothing which corresponds very closely to a bank's surplus. An investment made nearly seventy-five years since of $4,156,000 has now a value of $4,000,000 in excess of that cost. The property is the same property. The conceded fact is that through renewals, alterations and betterments made from time to time and the natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been any hiding away of capital added, by either new stock, or by the use of bonds or other forms of credit, nor that the improvements made from time to time, called "renewals, alterations and betterments" have been other than the necessities of an enlarging business and the improved maintenance naturally demanded. There is no suggestion that there has been any bad faith in covering up taxable assets under cover of assets immune. *Mobile & Ohio Railroad Co.* v. *Tennessee*, 153 U. S. 486, 506.

After all, the precise question is, whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the State did not intend that any other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other taxation than one measured by the amount of its net profits? The contract, though one for a partial exemption from taxation, may nevertheless be read

in the light of the purpose sought to be accomplished and the public policy entertained at the time. That is true of this, as well as other contracts, namely, that the meaning may be discovered by regard to attendant circumstances. That the intent was to exempt a capital aggregating $1,156,000, is for the purpose of the present question the necessary foundation of the claim now being looked at. That was at the beginning mere subscribers' promises to pay; next, money in the treasury of the company. While money, the charter says, it may, until needed, be invested "in the public stock of the United States or of the State of Georgia." But this capital was intended to be the only means by which this line of railroad was to be constructed and equipped. Thus, the original capital was fixed at one and a half million dollars, with power to enlarge same, "so as to make their capital adequate to the work." This power of increase does not seem to have been regarded as clear enough, and when an authorized extension of the work demanded more capital the charter was amended so as to increase it to four million dollars, "to meet excess of cost of road over present capital." To insure the completion of the authorized road within the limit of the fixed capital it was provided that the engagements of the company should not exceed the company's capital, and that the officers and directors who should contract beyond that capital should be jointly and severally liable to the contractors and to the corporation. Finally, no power was given to issue bonds, the usual incident to any modern railway construction. From the plain purpose that this authorized capital should be adequate to the construction and equipment of a particular railroad, it is plainly inferable that that railroad should be subject, after a time of complete immunity, only to a tax upon the profit of its operation. That railroad is the product of the investment of the authorized capital, and is, as such, subject only to a tax based upon its "net proceeds." This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is

absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income. *State of Georgia* v. *Atlantic and Gulf R. R. Co.*, 60 Georgia, 268.

We are, therefore, of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia legislature, in so far as it provides for an *ad valorem* tax upon any part of this invested capital of the Georgia Railroad and Banking Company, does impair the obligation of the contract.

But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular.

If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad. The Georgia act taxing franchises treats the franchise as property and requires that "they shall be returned and valued in the same way as returns are made by railroads of their physical property. . . ." And that "all franchises of value shall be returned for taxation and taxed as other property." That a law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract

is well settled. *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Gulf & Ship Island Railroad* v. *Hewes*, 183 U. S. 67, 77.

Included in the total mileage owned and operated by the appellee railroad company is a line eighteen miles long, known as the Washington Branch. The company has all along claimed that this branch road was within the partial exemption clause of its original charter, granted in 1833. So far as appears from this transcript, this claim has not before been challenged, though no distinct issue seems ever to have been made in respect to its exclusion by reason of the legislation under which that branch was acquired. Neither does the answer of the comptroller in this case claim or set out any difference between the tax exemption applicable to the other parts of the appellee's railroad and this Washington branch, and the decree of the court below expressly finds that the original charter exemption includes this Washington branch. But the general denial that any part of the property of the railroad company was exempt from *ad valorem* taxation may well be regarded as covering the parts which make up the whole. To the decree holding the Washington branch exempt the comptroller has moreover assigned error, based upon the legislation under which that branch was constructed. The right of exemption claimed for this branch was, however, distinctly put in issue by the counties of Wilkes and Talliaferro, which, for this purpose, were allowed to intervene, having a direct interest due to the fact that that branch, passing through those counties, would be subject to county taxation if not within the tax exemption clause. These counties have appealed from the decree below and assigned error also.

The first legislative enactment in regard to the construction of the Washington branch road seems to have been in the act of 1833; but nothing was ever done under that. The same may be said in reference to another act passed in 1836. In December, 1847, an act was passed in these words:

"The power heretofore granted to the Georgia Railroad

and Banking Co. to construct a branch of their road to Washington, in the county of Wilkes, be, and the same is, hereby revived and authorized to be exercised by said company, provided that the amount of the increased stock of said company ($200,000) shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the legislature may hereafter impose."

But this was a section in an act amending the charter, and was never accepted. See 26 Georgia, 651, 654. At the same legislative session, on February 5, 1850, another act was passed in these words:

"That [naming incorporators] be and they are hereby authorized to build, construct and keep a plank or railroad from the town of Washington, in Wilkes county, to some point on the Georgia Railroad and Banking Company's railroad, and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding $200,000, and shall be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

So far as we can discover, the only legislative authority for the construction or acquirement of a branch railroad to Washington, accepted or acted under by it, is found in the act of January 21, 1852, entitled "An act to authorize the consolidation of the stocks of the Georgia Railroad and Banking Company and of the Washington Railroad or Plank Road Company, incorporated, February the fifth, eighteen hundred and fifty, and for other purposes." The first section of that act provides:

"That the Georgia Railroad and Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their stocks, the said Georgia Railroad and Banking Company issuing stocks in their said

company to the stockholders of the Washington Railroad or Plank Road Company, on terms of equality with the general stockholders in amount equal to the amount held by them respectively in the stock of the Washington Railroad or Plank Road Company, and that the two companies aforesaid, after the consolidation of their stocks, shall be known as one corporate body, under the name and style of the Georgia Railroad and Banking Company, and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Company, and be under all the liabilities and restrictions imposed on the same."

That this consolidation neither extinguished the Georgia Railroad and Banking Company, nor deprived it of any of its powers, privileges or immunities, is plain. No such result has been claimed. Nor is it claimed that it thereby lost any tax exemption which it then had. The act authorizing the consolidation is substantially like that under which the Central Railroad and Banking Company was consolidated with the Macon Railroad, considered in *Central Railroad Company* v. *State of Georgia*, 92 U. S. 665, where it was held that the tax exemption which the Central Railroad had enjoyed, continued after consolidation in respect of the property of that company, but that as the Macon company, consolidated with it, had no exemption, its property continued subject to taxation. That the Washington Railroad or Plank Road Company would go out of existence when this merger was accomplished is plain; it was, indeed, absorbed by the Georgia company. The purpose was to vest in the latter all of the rights, powers and privileges of the merged company without diminishing or enlarging them. See what is said by Chief Justice Fuller in commenting upon a similar merger in *W. & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 300.

Did the Washington Railroad before consolidation possess any contract tax exemption?

The claim that it did is based upon the provision in the

act under which it was incorporated, providing that it should "be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833 to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

The question, then, is, whether, under the power "to *exercise* all the *powers* and *privileges* [italics ours] conferred by the act incorporating the Georgia Railroad Company, the immunity from any other tax than one based upon a given per cent of annual net profits was granted to that company." The affirmative of this proposition finds some support in the cases of *Humphrey* v. *Pegues*, 16 Wall. 244; *Chesapeake & O. R. Co.* v. *Virginia*, 94 U. S. 718; *South Western R. Co.* v. *Georgia*, 92 U. S. 665, and *Tennessee* v. *Whitworth*, 117 U. S. 139. In later cases this doctrine of a legislative transfer of a tax immunity under the term franchise, powers, estates or privileges was questioned. Thus, in *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176, a tax immunity was held not to pass under a mortgage foreclosure sale under the provision of a statute which authorized the purchaser to become a corporation and "succeed to all such franchises, rights and privileges" pertaining to the mortgagor company. In *Picard* v. *East Tennessee &c. R. Co.*, 130 U. S. 637, 642, it was held that such an immunity would not pass to a purchasing company under a decree enforcing a statutory lien, where the sale, as confirmed, was of the "property and franchises" of the mortgagor company. In that case it was said:

"It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 297; *K. & W. R. Co.* v. *Missouri*, 152 U. S. 301, and *Phœnix Fire & Marine Insurance Co.* v. *Tennessee*, 161 U. S. 174, the earlier cases were also much shaken so far as they tended to establish that a tax exemption would be transferred by legislative enactment conferring upon one road the powers or franchises or privileges of another, in the absence of other language or pregnant circumstances, showing a plain intent to confer such exemption.

But whatever doubt upon this subject may have existed as to the effect of the transfer to one company of the powers and privileges of another in conferring a tax exemption possessed by the latter is set at rest by *Rochester R. R. Co.* v. *Rochester*, 205 U. S. 236, 252. Mr. Justice Moody, after reviewing all of the cases referred to above and others, sums the matter up by saying:

"We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity."

There is an absence of anything in the history of this branch railroad which points to a purpose to grant any exemption from taxation. Thus, in the act of December 20, 1849, reviving the authority of the Georgia Railroad and Banking Company to construct such a branch, originally authorized by earlier acts, it was expressly provided that the stock to be issued for the purpose "should not be exempt from taxation, as is secured to the present stock by the later clause of the 15th section of the charter of said company," etc. This provision was probably the very reason why the Georgia Railroad and Banking Company did not accept or act under that statute. At the same session of the legislature an independent company was created to construct and operate the same branch road. Presumably with the knowledge of the fact that the Georgia Railroad and Banking Company could

not itself construct this road with immunity from taxation, this act authorizing this new corporation to build the same branch, declared that this company should be "authorized to *exercise* [italics ours] all powers and privileges" conferred by the act originally creating the Georgia Railroad and Banking Company. It is one thing to have authority to "exercise" all the "powers and privileges" of another company, and another thing to enjoy an exemption from taxation. The "*exercise*" of the "powers and privileges" of the company referred to was reasonably essential to the construction and operation of the independent railroad. Its immunity from taxation was not. See *Wilmington & Weldon R. R.* v. *Alsbrook*, 146 U. S. 279, 295, and *National Bank* v. *United States*, 101 U. S. 1. The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

We conclude, therefore, that the Washington Railroad or Plank Road Company had no exemption from taxation at the time this consolidation occurred. That the consolidating act did not intend to confer any immunity from taxation which did not then exist is plain. The object was to vest in the Georgia company the property and franchises and rights and privileges of the Washington company. When the Georgia company succeeded to its property and franchises, it did so subject to whatever right the State had in the matter of taxation. The case in this aspect is controlled by *Central Railroad Co.* v. *Georgia*, 92 U. S. 665.

The decree of the court below is modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects it is affirmed. The costs of this appeal will be divided between Wright, Comptroller General, and the Georgia Railroad and Banking Company.

Affirmed.